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No. 06-537

In The

Supreme Court of the United States

TONIE LLERA HOLTON,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Georgia

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

United States v. Marion, 404 U.S. 307 (1971) and *United States v. Lovasco*, 431 U.S. 783 (1977) provide that in order to establish a pre-indictment delay amounting to a violation of due process, a defendant must show that he or she suffered "actual prejudice" from the delay and that the delay was the product of prosecutorial impropriety.

Petitioner was indicted in 2002, twenty years after a grand jury returned a "no bill" in the 1982 death of her husband's former wife. In 2003, Petitioner was convicted of murder and was sentenced to a life term in prison.

Between 1982 and the 2002 indictment, witnesses who had provided or collected information helpful to Petitioner died or become inaccessible, "changes" occurred in memories and statements of witnesses who were family members or friends of the deceased, and physical evidence was lost, all to Petitioner's harm. To explain the prosecutorial delay following the 1982 grand jury refusal to indict Petitioner, the State presented evidence and argument that for several years following the "no bill," the district attorney improperly refused to reopen the case.

This case presents two questions over which the United States Courts of Appeals and the highest courts of the various states are divided:

1. In making a due process analysis, what constitutes "actual prejudice" to a defendant resulting from pre-indictment delay?

2. If "actual prejudice" is found, what precipitating prosecutorial impropriety must be demonstrated to show a due process violation?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	2
A. Overview of the Issues and Contentions	2
1. Overview of Actual Prejudice	2
2. Overview of Prosecutorial Impropriety	2
B. Presentation and Preservation of Issues	3
C. The Incident	4
D. Actual Prejudice	5
E. Prosecutorial Improprieties	11
REASONS FOR GRANTING THE PETITION	13
A. As reflected in its decision in this case, the Supreme Court of Georgia applies criteria conflicting with decisions of this Court in determining whether prosecutorial pre-indictment delay has violated a defendant's right to Due Process of Law under the Fifth and Fourteenth Amendments	14
1. "Actual Prejudice" in Georgia: A Question of "Equal Hindrance"	15
2. Prosecutorial Improprieties in Georgia	19

TABLE OF CONTENTS – Continued

Page

B. This Court should resolve existing conflicts among the United States Courts of Appeals and among the Highest Courts of the various States in deciding and applying criteria for determining whether prosecutorial pre-indictment delay has violated a defendant's right to Due Process of Law under the Fifth and Fourteenth Amendments 21

CONCLUSION 29

APPENDICES

A. Opinion of the Georgia Supreme Court (June 26, 2006) ..... App. 1

B. Opinion of the Superior Court of Dougherty County, Georgia (August 15, 2005) ..... App. 10

C. Judgment of Conviction and Sentence of the Superior Court of Dougherty County, Georgia (February 4, 2003) ..... App. 22

D. Order of the Georgia Supreme Court Denying Motion for Reconsideration (July 27, 2006) ..... App. 24

E. Petitioner's Enumeration of Errors Submitted to the Georgia Supreme Court in her Appeal from the Superior Court of Dougherty County, Georgia (December 16, 2005) ..... App. 25

F. Portion of Petitioner's Brief Submitted to the Georgia Supreme Court in her Appeal from the Superior Court of Dougherty County, Georgia (December 16, 2005) ..... App. 29

TABLE OF CONTENTS – Continued

Page

G. Portion of Petitioner's Supplemental Brief Submitted to the Georgia Supreme Court in her Appeal from the Superior Court of Dougherty County, Georgia (February 3, 2006).....App. 50

TABLE OF AUTHORITIES

Page

CASES

Clark v. Maryland, 364 Md. 611, 774 A.2d 1136 (2001) 28

Commonwealth v. Scher, 569 Pa. 284, 803 A.2d 1204 (2002) 29

Doggett v. United States, 505 U.S. 647 (1992) 24

Giglio v. United States, 405 U.S. 150 (1972) 12

Hoo v. United States, 484 U.S. 1035 (1988) 24, 25, 26

Jackson v. State, 279 Ga. 449, 614 S.E.2d 781 (2005) .....*passim*

Roebuck v. State, 277 Ga. 200, 586 S.E.2d 651 (2003) 17, 18

State v. Madden, 242 Ga. 637, 250 S.E.2d 484 (1978) 15, 16

United States v. Brockman, 183 F.3d 891 (8th Cir. 1999) 27

United States v. Brown, 959 F.2d 63 (6th Cir. 1992) 26

United States v. Crouch, 84 F.3d 1497 (5th Cir. 1996) 26

United States v. DeLeon, 444 F.3d 41 (1st Cir. 2006) 25

United States v. Eight Thousand Eight Hundred And Fifty Dollars ($8,850) In United States Currency, 461 U.S. 555 (1983) 23, 24, 27

United States v. Greene, 737 F.2d 572 (6th Cir. 1984) 27

United States v. Jackson, 446 F.3d 847 (8th Cir. 2006) 27

TABLE OF AUTHORITIES – Continued

Page

United States v. Lovasco, 431 U.S. 783 (1977) .....*passim*

United States v. Lieberman, 608 F.2d 889 (1st Cir. 1980) 25

United States v. Marion, 404 U.S. 307 (1971) .....*passim*

Wooten v. State, 262 Ga. 876, 426 S.E.2d 852 (1993) .....*passim*

CONSTITUTIONAL PROVISIONS, STATUTES, RULES, AND GUIDELINES

Fifth Amendment to the United States Constitution 1

Fourteenth Amendment to the United States Constitution 1

Ga. Code Ann. § 17-16-1 et seq. (2005) 3

PETITION FOR A WRIT OF CERTIORARI

Tonie Llera Holton respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Georgia in this case.

OPINIONS BELOW

The Opinion for which review is herein sought (App. 1-9) is not yet published in Georgia Reports but is unofficially reported at 632 S.E.2d 90 (2006). The Order denying rehearing (App. 24) is unreported. The Order of the court of first instance, the Superior Court of Dougherty County, Georgia, denying Petitioner's Motion for New Trial (App. 10-21) and the Judgment of Conviction and Sentence of that Court (App. 22-23) are unreported.

JURISDICTION

Petitioner seeks certiorari review of a judgment of the highest court in Georgia affirming her conviction for murder. The initial decision by that court was entered June 26, 2006, and Petitioner's Motion for Rehearing was denied July 27, 2006. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

This Petition seeks relief under the "Due Process" Clauses of the Fifth and Fourteenth Amendments which provide in relevant part, as follows:

AMENDMENT V.

> No person shall . . . be deprived of life, liberty, or property, without due process of law. . . .

AMENDMENT XIV.

> No State shall . . . deprive any person of life, liberty, or property, without due process of law. . . .

STATEMENT OF THE CASE

A. Overview of the Issues and Contentions:

The decision for which Petitioner seeks review upholds her conviction for murder in the 1982 shooting death of Debra Holton. Petitioner asserts that she has been deprived of liberty without due process of law. In brief overview, her specific contentions are as follows:

1. Overview of Actual Prejudice

A twenty year lapse between the incident and the indictment profoundly impaired Petitioner's ability to defend against the charges because (1) statements and reported observations favorable to Petitioner from witnesses who had since died or disappeared could not be duplicated at trial, (2) physical evidence that corroborated Petitioner's testimony that the shooting of Debra Holton was unintentional was lost by the State in the intervening years, and (3) Petitioner's ability to impeach hostile witnesses was significantly hindered by the deaths of witnesses who observed critical events or who investigated the case on behalf of the State. See pages 5 through 11, infra.

2. Overview of Prosecutorial Impropriety

Delay in bringing the October 23, 2002 indictment was a result of prosecutorial improprieties, beginning with the District Attorney's refusal in 1982 to collect, preserve or consider "independent" evidence presented to the prosecutor and his investigator. The refusal was in reckless disregard of the consequent prejudice to Petitioner's ability to defend herself in the future.

The original failure to preserve or consider independent evidence was improperly exploited by the prosecution in later years through abandonment of routine procedures for the collection and maintenance of evidence, with the result that Petitioner was denied information typically

disclosed to defendants through discovery.[1] See pages 11 through 13, infra.

B. Presentation and Preservation of Issues:

The due process questions presented in this Petition were initially raised in the court of first instance as part of a Motion for New Trial.[2] (App. 12-13) Relying on *Jackson v. State*, 279 Ga. 449, 614 S.E.2d 781 (2005), a decision of the Georgia Supreme Court purporting to apply directives from *United States v. Marion,* 404 U.S. 307 (1971) and *United States v. Lovasco,* 431 U.S. 783 (1977), the trial court denied relief, finding that Petitioner "cannot prove" two requisite elements of the asserted due process violation, namely (1) "actual prejudice" to the defense caused by the twenty year lapse between the death of Debra Holton and Appellant's 2002 indictment and (2) deliberate action by the prosecution causing the delay for the purpose of gaining tactical advantage. (App. 17-20)

Petitioner appealed directly to the Supreme Court of Georgia (R-1-3), raising several issues, including the violation of due process through prosecutorial pre-indictment delay. (App. 25-28)

Relying on its decisions in *Jackson v. State* and *Wooten v. State,* 262 Ga. 876, 426 S.E.2d 852 (1993), the Supreme Court of Georgia affirmed the trial court (App. 1-9) and then denied Petitioner's Motion for Reconsideration. (App. 24)

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[1] Ga. Code Ann. § 17-16-1 et seq. (2005).

[2] In *United States v. Marion,* this Court instructed that the "[e]vents of [a] trial may demonstrate actual prejudice," but the degree, if any, to which a defendant's due process rights are prejudiced by pre-indictment delay cannot be anticipated, and presentation of the issue prior to trial is "speculative and premature." 404 U.S. 307, 326 (1971).

C. The Incident:

On September 25, 1982, at about 5:00 in the morning, Debra Holton was dropped off at the home of Hilda Lowery who lived across the street from Ms. Holton's former residence in Dougherty County, Georgia. The former residence was then the home of Debra Holton's former husband, John Holton, and his wife, Petitioner, Tonie Llera Holton. (T-490-91) That morning, Mr. Holton was at work and only Petitioner and her adult brother, Mark Llera, were at home, where they were both asleep. (T-816-17)

On the previous evening, there had been a confrontation between Debra Holton and Petitioner at the night club where Petitioner worked as a cocktail waitress. Debra Holton had been ejected from the club because of the encounter. (T-1058)

For several hours after arriving at Ms. Lowery's home, Debra Holton repeatedly crossed the street, variously ringing the doorbell, scattering items in the yard, and throwing pebbles against the windows. (T-515, 1058-59) At one point, Petitioner answered the front door. There was a brief exchange but no physical contact between the women. Petitioner closed her door and returned to bed (T-567) while Debra Holton returned to Ms. Lowery's home. (T-1059)

About 8:40, Debra Holton gave Ms. Lowery "a piece of paper with her sister's name on it and said 'If they have me locked up, call my sister or mother. . . .'" (T-1059-60) Debra Holton returned to Petitioner's door and rang the bell numerous times. (T-567)

Petitioner again arose from bed and answered the door, this time taking a sawed off shotgun that, according to one of Debra Holton's sisters, John Holton kept in the house because of threats made on his life. (T-260) Petitioner contends she grabbed the shotgun only to frighten Debra Holton. (T-567)

There is dispute as to what was said and what occurred initially in that final exchange at the front door. The State contends that Petitioner intentionally shot Debra Holton as she approached. Petitioner contends that when Debra Holton saw the shotgun, she lunged at Petitioner and grabbed her hair, pulling her out of the house. Petitioner described a "tug of war" struggle in which she tried to protect the shotgun as Debra Holton pulled her hair while both women were bent over, pulling in opposite directions. (T-821)

Petitioner testified that Debra Holton was able to pull out a handful of Petitioner's hair and that she and Petitioner fell backward and away from each other, causing Petitioner to trip over the threshold, into the front room and onto her buttocks. In falling back and hitting the floor, the gun discharged accidentally. (T-820-23) Debra Holton died from her wound.

Portions of the incident were observed by Hilda Lowery, Jackie Lowery, seven years old, and Jack and Billie Lewis and their daughters, Michelle and Kim, twelve and eight years of age, respectively.

D. Actual Prejudice:

Between the 1982 incident and Petitioner's 2002 indictment, several witnesses died and another was unavailable at the time of trial. Petitioner's ability to mount a defense was lost due largely to the absence of those witnesses and the inability to duplicate the evidence they would have provided. The harm to Petitioner's defense from the deaths or disappearance of witnesses and evidence is best shown by reference to the evidence that was not and, in some instances, the evidence that was presented.

L.L. Bronson, unavailable (T-762)

The responding officers were L.L. Bronson and Margaret Polich. Bronson was the senior officer and filed a

report containing a recital that "[u]pon arrival [at the scene] officers saw a white female lying on the ground approximately 5 feet from the front door [and] *a patch of what appeared to be human hair was lying next to the female.*" (T-583-84) Officer Polich testified that she did not remember seeing the body or the hair. (T-584)

Though she acknowledged having probably reviewed Officer Bronson's report in 1982, Officer Polich would not confirm his record of times of call or arrival on scene. (T-557, 583)

Captain Tommy Graham, deceased (T-725)

Captain Graham was the investigator on this case in 1982 and for several years thereafter. He interviewed Petitioner after she was arrested. He also collected physical evidence and interviewed Ms. Lowery, Jackie Lowery, Mr. and Mrs. Lewis (neighbors), Mark Lle. , John Holton, and perhaps most significantly, Zachary Haggard. The impact of Captain Graham's death on Petitioner's ability to mount a defense is described below by reference to specific witnesses or evidence and cannot be overstated.

Mr. Zachary Haggard

Mr. Haggard's testimony, offered by the State, is significant because it differed substantially from the information reported by Captain Graham as having been given in an interview with Mr. Haggard seventeen days after the incident. (Defendant's Exhibit #45, T-1056-57) According to Captain Graham's summary, (1) Mr. Haggard described meeting Debra Holton, whom he knew, at approximately 10:30 on the night before the shooting, and (2) Mr. Haggard dropped Debra Holton off at Hilda Lowery's house between 5:30 and 6:00 that morning. *Id.*

Most importantly, in Captain Graham's summary Mr. Haggard described meeting Debra Holton after "she had been asked to leave [Petitioner's place of employment] because of a disturbance [Debra Holton] had caused." The

summary makes no mention of any claim by Mr. Haggard as having been a witness to the earlier "disturbance" or of being in that location. *Id.*

Twenty years later, Mr. Haggard denied that he had known Debra Holton before that night. (T-358) He testified that he witnessed the encounter between Debra Holton and Petitioner and that he asked the "bouncer" "why he was throwing Debbie out; that she wasn't the one that started it." (T-362) At trial his description of the encounter portrayed Petitioner as aggressively seeking confrontation with Debra Holton.

Captain Graham's death enabled Mr. Haggard to deny recitals in the summary and to testify that he gave Captain Graham a separate written statement. There is no record of that statement. (T-373-74) Without Captain Graham, Petitioner's only means to impeach Mr. Haggard was through his criminal record and to establish his close relationship with the other friends and family of Debra Holton and that he, like they, had consciously avoided repeated efforts by the defense to contact him prior to trial. (T-375-76)

Mark Llera, deceased (T-412)

The death of Petitioner's brother silenced the voice of the only person in the house with Petitioner at the time of Debra Holton's forays to the yard and front door. (T-817) Perhaps more importantly, it allowed the State to argue Mr. Llera's participation in a cover up (T-150) and permitted a change in Hilda Lowery's memory to support that argument. (T-510-11, 519)

Steve Brown, deceased (T-551)

The Paramedic who tended to Debra Holton had also died. Observations in his trip report addressed her physical condition and progress and recorded time of arrival and departure from the scene. (T-552) His absence allowed

the State to question his accuracy and method of recording those times.

The Hair

Captain Graham collected something from the scene and placed it in an evidence envelope that he signed and marked "found in yard" and added the date and address of the incident. (Defendant's Exhibit #139, T-580, 584-85, 1074). Sometime prior to trial, that envelope contained hair. (Defendant's Exhibits ## 137, 138 and 139, T-1073-75) At trial, the envelope was empty. (T-579) The State had lost the hair, and the jury could only speculate as to the content of the envelope.

No physical evidence in this case was more critical to the defense than the hair, seen and reported by Officer Bronson, collected and packaged by Captain Graham, and lost by the State between September 25, 1982 and the January 2003 trial. The hair, had it been produced at trial, or described to the jury by Officer Bronson or Captain Graham, would have corroborated Petitioner's account of the tug of war resulting in a handful of hair snatched from her head as she and Debra Holton fell away from each other. Captain Graham was dead, Officer Bronson was unavailable, and the hair was lost by the State, leaving Petitioner with only an empty envelope and weak evidence for corroboration.[3]

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[3] In its Order regarding Defendant's Motion for New Trial, the trial court found it significant that Jackie Lowery, the then seven year old daughter of Hilda Lowery, said in a tape recorded statement to Captain Graham that she was in the yard at the time of the incident and saw no hair pulling at the scene. (App 15 fn. 20) Ms. Lowery was seven years old at the time of the incident (T-527) and could only remember "bits and pieces" at the time of trial. Her account of the incident was from the tape played to the jury. (T-528) She did not testify to any portion of the altercation from her present memory. The trial court failed to mention that in the same tape, Jackie Lowery said "Tonie didn't shoot

(Continued on following page)

Hilda Lowery

Without Officer Bronson, Captain Graham, Mark Llera or Steve Brown to contradict her, Ms. Lowery was able to testify to matters not contained in her 1982 handwritten statement. (T-512-19) Based on the new testimony from Ms. Lowery, the State argued, apparently with success, that Petitioner tampered with evidence after the incident and before police arrived.

The argument was dependent on inaccuracy in the times noted in the police incident and the ambulance trip report. It thus depended on the absence of other evidence to contradict the State's time line and sequence of arrival and departure of police and ambulance. It depended on Hilda Lowery's testimony that either the suggestion of sequence in her handwritten summary to Captain Graham was wrong or that she could not remember whether the ambulance arrived and left before the police arrived. (T-497, 1060) That failed memory dovetailed for the State with Officer Polich's inability to remember seeing Debra Holton on the ground when she and Officer Bronson arrived.

The Secret Witnesses

The State presented members of Debra Holton's family, including a sister who testified that she and others early on had relevant information that was ignored by

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her but she was just holding the gun. She didn't make it go off; it just went off by itself and it shot Debbie." (T-532)

The trial court also failed to note there was testimony from Michelle Lewis Salter, then twelve years old, and her then eight year old sister, Kimberly Lewis VanMatre, who lived next door to the Lowery home and who both testified to their observations of the incident from present memory.

Ms. Salter: "They was pulling clothes and snatching hair . . . just a cat fight." (T-585)

Ms. VanMatre: "[T]hat's mostly what I remember . . . big huge chunks of hair flying in the air." (T-882)

District Attorney Hobart Hind,[4] in spite of over two years of continuous contact with Captain Graham and the District Attorney's Office. (T-246-48) Another sister testified she met Mr. Hind "after . . . the grand jury did a no bill," and he said "the investigation was basically closed [because Debra Holton] was not a worthy enough citizen for the taxpayers money to further investigate." (T-305) Aside from their words, there is no record of any contact by either sister with Captain Graham or Mr. Hind.

The sisters testified, (T-236, 262) as did a sister-in-law, (T-310) and Lisa Johnson, a friend to Debra Holton's family (T-326), each describing previously undisclosed encounters between Petitioner and Debra Holton and portraying Petitioner as hostile to the point of homicidal premeditation toward Debra Holton. That testimony, along with the apparent change in evidence from Mr. Haggard and additions to Ms. Lowery's memory, was first revealed as those witnesses testified at trial.

When they tried to have the case reopened twenty years before indictment, the sisters would have known the facts to which they later testified. Had the District Attorney, armed with that evidence, taken this case back to the grand jury and secured the indictment in the "two or three years" after the initial "no bill," Petitioner would have known the evidence alleged against her at a time she had opportunity to refute it through witnesses who were still alive.

Because the State was able to exploit twenty years of disregard to usual practices of making and keeping records of investigation, the accusations came without warning, leaving Petitioner with no rebuttal evidence to support her denials. (T-813)

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[4] Mr. Hind died prior to the 2002 indictment. The circuit where this case was tried has had three District Attorneys since 1982. (App. 10-11 fn. 1)

Absolute Prejudice

Time robbed Petitioner of testimony that led one grand jury to find no probable cause to prosecute her. Prosecutorial disregard lost physical evidence that Debra Holton was shot accidentally as she attacked Petitioner. Delay by the prosecution cheated Petitioner of the opportunity to refute accusations of premeditation. The prejudice to Petitioner's ability to mount a defense was, by any definition, "actual" and absolute.

E. Prosecutorial Improprieties:

A central theme of the state, apparently to give the jury a reason for the halted prosecution, was that District Attorney Hind callously and recklessly disregarded incriminating evidence after a grand jury failed to indict Petitioner in 1982. The theme began in opening statement:

> We expect the evidence to show you . . . that [Debra Holton's] family made repeated efforts to try to get the case re-opened. . . . [T]he District Attorney, Hobart Hind himself, who had a reputation for doing this stuff, said we are not going to waste any more resources on [Debra Holton]. She is not worth wasting any more resources.

(T-165-66)

The claim of Mr. Hind's malfeasance came as a surprise to the defense because the absence of records of Debra Holton's sisters' communication with Captain Graham and with Mr. Hind in the years following the initial refusal to indict Petitioner meant a void in records produced by the State in discovery.[5]

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[5] The absence of records of the meetings means either (1) the State recklessly disregarded potentially incriminating evidence against Petitioner or (2) the substance of the meetings, if they occurred, was trivial and there was no need to make a record. In the latter event, the testimony of

(Continued on following page)

The State later expanded that void in the reopened investigation. Apparently in preparing this case for trial, the District Attorney's investigators abandoned usual procedures of recording witness interviews and creating a "synopsis" of each interview. (T-792) No record was made of interviews with Debra Holton's sisters, John Holton, Lisa Johnson, Zachary Haggard, Hilda Lowery or Jackie Lowery.[6] Thus, no discoverable material regarding the State's premeditation evidence was generated.

The evidence remained secret until trial because the witnesses called to establish premeditation uniformly refused interview by the defense. The three members of Debra Holton's family who testified for the State "elected" not to speak to the defense. (T-249) Hilda Lowery, a friend of the family, "evaded" interview by the defense. (T-505) Her daughter, Jackie Lowery, advised defense attorneys that she would not talk to them. (T-546) Lisa Johnson, also a friend of the family, was advised by the prosecutor that she was not required to give an interview to the defense. (T-348) Ms. Johnson and her close friend, Zachary Haggard (T-345), scoffed over the many times the defense tried to reach them. (T-372) John Holton, the former husband of Petitioner and Debra Holton, also refused defense efforts to communicate, but he gratuitously injected:

> There is a lot here that is not being brought out by all this. And there is too much being painted into the picture that's not valid. Really it was pretty simple. Doesn't look too good for you, but its pretty simple.

(T-453) He followed with:

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the sisters would be false, a fact that would have been known to Mr. Hind. That knowledge is chargeable to the current prosecutor because "[t]he prosecutor's office is an entity and as such it is the spokesman for the Government." *Giglio v. United States*, 405 U.S. 150, 154 (1972).

[6] It is assumed that there was no record of the identified interviews because no record was received in discovery.

> Well, in justice, sir, I don't think you learn to deal with the truth. You are constantly binding it to make it work for you. But to tell the truth and let things fall where they may? That don't serve your purposes.

(T-454)

In 1982, when Petitioner had access to exculpatory evidence, the State improperly halted consideration of the circumstances of Debra Holton's death. Incredibly, according to the prosecution, the District Attorney ignored evidence that Petitioner premeditated the shooting of Debra Holton. In 2002, the State reopened the investigation in a way to capitalize on and further the initial prosecutorial disregard for investigative method, all to the prejudice of Petitioner who was thereby denied the benefit of exculpatory evidence.

The delay in securing an indictment began in 1982 with the District Attorney's reckless disregard for the Petitioner's right to due process of law. In order to improperly effectuate nondisclosure of otherwise discoverable information, the delay was exploited for tactical advantage by the prosecution in the months prior to the 2002 indictment.

REASONS FOR GRANTING THE PETITION

In *United States v. Marion* the Court explained that statutes of limitation are not the only safeguard against delayed indictment and that under some circumstances the Due Process Clause protects a defendant from improper deferral of criminal charges. 404 U.S. 307, 324 (1971). Six years later *United States v. Lovasco* confirmed that to establish a due process violation sufficient to dismiss an indictment, a defendant must demonstrate "actual prejudice" from the delay, and the court must "consider the reasons for the delay." 431 U.S. 783, 789-90 (1977).

The courts are divided, however, in determining:

(1) What constitutes "actual prejudice" to a defendant resulting from pre-indictment delay, and

(2) Once "actual prejudice" is found, what factors precipitating the delay must be demonstrated to show a due process violation.

This case presents viable considerations for both of those inquiries and provides the Court an opportunity to resolve the division among the courts. The petition should therefore be granted.

A. As reflected in its decision in this case, the Supreme Court of Georgia applies criteria conflicting with decisions of this Court in determining whether prosecutorial pre-indictment delay has violated a defendant's right to Due Process of Law under the Fifth and Fourteenth Amendments.

With the same breath that the Court held that "the Due Process Clause has a limited role to play in protecting against oppressive delay" in securing a criminal indictment, it also concluded that under the circumstances there presented:

> We need not . . . determine when and in what circumstances actual prejudice resulting from preaccusation delays requires the dismissal of the prosecution. Actual prejudice to the defense of a criminal case may result from the shortest and most necessary delay; and no one suggests that every delay-caused detriment to a defendant's case should abort a criminal prosecution.

Lovasco, 431 U.S. at 789-90 (quoting *Marion,* 404 U.S. at 326).

Since *Lovasco*, this Court has not been presented with a case that permitted clear direction on both due process elements: the meaning of "actual prejudice" and the factors that turn actual prejudice into a denial of due process. Thus, many courts have misinterpreted *Marion*

and *Lovasco* to create due process criteria never intended or authorized by this Court.

In this case, the Supreme Court of Georgia cited only its own decisions as precedent and spoke to Petitioner's due process claim, as follows:

> Defendant claims she was denied her due process rights because the State delayed the prosecution for 20 years. In order to prevail on this claim, defendant must show (1) that the delay actually prejudiced the defense *and* (2) that the prosecution deliberately delayed the case in order to gain a tactical advantage. *Jackson v. State,* 279 Ga. 449, 450 (2), 614 S.E.2d 781 (2005); *Wooten v. State,* 262 Ga. 876, 878 (2), 426 S.E.2d 852 (1993). Defendant has not made either showing. True, several witnesses died in the intervening years and some pieces of evidence were missing. *But this* ***hindered the prosecution as much as defendant****; it is the type of prejudice inherent in any extended delay.* See *Jackson v. State,* supra; *Roebuck v. State,* 277 Ga. 200, 205, 586 S.E.2d 651 (2003).

(App. 3-4) (footnotes omitted) (emphasis supplied).

1. "Actual Prejudice" in Georgia: A Question of "Equal Hindrance"

Because it follows a line similar to other courts that have misinterpreted *Marion* and *Lovasco*, it is helpful to track the progression of cases in Georgia.

Like *Marion*, the defendant in *State v. Madden* was charged with an offense that was subject to an unexpired statute of limitations but for which the State had delayed indictment. 242 Ga. 637, 250 S.E.2d 484 (1978). Reversing the Georgia Court of Appeals which had held that the delay prejudiced the defendant's ability to raise an alibi defense because he could not remember anything about the dates on which he had allegedly committed the

offenses, the Supreme Court of Georgia expressly relied on *Marion* in concluding that the defendant had not shown actual prejudice resulting from the delay. Using this Court's language, the court wrote:

> Appellees rely solely on the real possibility of prejudice inherent in any extended delay: That memories will dim, witnesses become inaccessible, and evidence be lost. In light of the applicable statute of limitations, however, these possibilities are not in themselves enough to demonstrate that appellees cannot receive a fair trial and therefore to justify the dismissal of the indictment.

242 Ga. at 637, 250 S.E.2d at 485 (quoting *Marion*, 404 U.S. at 325-26).

The language was appropriate and dispositive in *Madden* because, as in *Marion*, the defendant had not yet stood trial, and it was speculative and premature to consider whether dimmed memories, lost evidence, and inaccessible witnesses would cause prejudice to the defense. But the next time the quoted language was used by the Supreme Court of Georgia, the pre-indictment delay issue was not raised in a pretrial motion or in a case where a statute of limitations afforded protection against delay in bringing charges.

In *Wooten v. State* the defendant had been tried and convicted for a murder that occurred twelve years prior to his indictment. 262 Ga. 876, 426 S.E.2d 852 (1993). The court considered a due process violation resulting from pre-indictment delay as follows:

> The appellant contends that his defense was prejudiced by the delay because potential defense witnesses either died before trial or could not remember crucial facts, and because material evidence was destroyed. The offense in this case is murder, for which there is no applicable

> statute of limitation. *Hence, any prejudice which results merely from the passage of time cannot create the requisite prejudice. The possibilities that "memories will dim, witnesses become inaccessible, and evidence be lost" are inherent in any extended delay, and, "these possibilities are not in themselves enough to demonstrate that [the appellant] cannot receive a fair trial. . . ." Marion*, 404 U.S. at 325-326, 92 S.Ct. at 466; *State v. Madden*, 242 Ga. 637, 638, 250 S.E.2d 484 (1978). As the appellant alleges nothing which should not be expected due to the passage of time, we cannot find that the prejudice alleged by the appellant is sufficient to require dismissal of the indictment.

262 Ga. at 880, 426 S.E.2d at 856 (emphasis supplied).

The language from *Marion* and *Madden* established only that concern over potential prejudice caused by pre-indictment delay is prematurely expressed in a pretrial motion, but in *Wooten*, the court tortured that language into a principle that "*any prejudice which results merely from the passage of time cannot create the requisite prejudice [to establish a potential due process violation].*" *Roebuck v. State*, 277 Ga. 200, 205, 586 S.E.2d 651, 657 (2003) (quoting *Wooten*, 262 Ga. at 880, 426 S.E.2d at 856) (emphasis supplied).

In the present case, the Supreme Court of Georgia cited *Wooten*, *Roebuck*, and *Jackson* as support for its holding that Petitioner had not shown pre-indictment delay in her case had actually prejudiced her defense. (App. 3-4) In *Jackson*, a witness identified her former husband and the defendant as the perpetrators of a murder twenty years earlier. As with every pre-indictment delay case decided in Georgia since *Wooten*, the court held the defendant had not established actual prejudice because:

> The prejudice asserted by Jackson is that his defense was weakened by the absence of witnesses

> who had died or could no longer be found and by the time-attenuated memories of witnesses who testified. "However, *'any prejudice which results merely from the passage of time cannot create the requisite prejudice.'* [Cit.]" *Roebuck v. State,* 277 Ga. 200, 205 (4), 586 S.E.2d 651, 657 (2003). Jackson *"has not demonstrated any prejudice which would not be expected due to the passage of time. After all, the possibility that memories will fade, witnesses will disappear and evidence will be lost are inherent in any extended delay."* . . .

279 Ga. at 451, 614 S.E.2d at 783-84 (emphasis supplied).

By the time Petitioner's case reached the courts, the test of due process prejudice in Georgia had become an impossible anomaly:

> A due process violation requires a finding . . . that the delay caused actual prejudice to the defense . . . However, "any prejudice which results merely from the passage of time cannot create the requisite prejudice."

Roebuck, 277 Ga. at 205, 586 S.E.2d at 657.

As in *Roebuck*, the court in Petitioner's case reasoned that the loss of evidence and the death or absence of witnesses "hinder[s] the prosecution as much as defendant [and] it is the type of prejudice inherent in any extended delay." (App. 4) With that reasoning the court appears to have concluded that procrastination in pursuing charges against a defendant is an **equal hindrance** to both sides in a criminal case and is therefore prejudicial to neither side. Thus, in Georgia actual prejudice from delay in prosecution is something other than prejudice from passage of time.

Plainly, that is not the result contemplated or logic employed when this Court advised that in weighing the impact of pre-indictment delay:

> To accommodate the sound administration of justice to the rights of the defendant to a fair trial

> will necessarily involve a delicate judgment based on the circumstances of each case.

Marion, 404 U.S. at 326.

2. Prosecutorial Improprieties in Georgia

Because no defendant has demonstrated, to the satisfaction of the Georgia courts, actual prejudice resulting from pre-indictment delay, it is not clear what criteria would be employed in Georgia to determine whether prejudicial delay violates the Due Process Clause. That is not to say that the courts in Georgia have been silent on the issue. Beginning with *Wooten*, those courts have recited a two part test as the measure of due process incompatibility.

> To find a due process violation where a delay precedes arrest and indictment, courts must find 1) that the delay caused actual prejudice to the defense, *and* 2) that *the delay was the product of deliberate action by the prosecution designed to gain a tactical advantage.*

Wooten v. State, 262 Ga. at 878, 426 S.E.2d at 855 (citing *Marion*, 404 U.S. at 324 and *Lovasco*, 431 U.S. at 795) (emphasis supplied).

The same language appears in *Jackson v. State*, where the appellant argued that:

> *Wooten* was wrong in requiring a dual showing and in requiring a showing of deliberate action designed to gain a tactical advantage because [the Supreme Court of Georgia] misinterpreted the decisions of the United States Supreme Court in *United States v. Lovasco* and *United States v. Marion*.

279 Ga. at 450, 614 S.E.2d at 783 (citations omitted). Rejecting that argument, the court countered:

> [T]he *Marion* court plainly stated as the basis of its ruling both parts of the test adopted in

> *Wooten*: "No actual prejudice to the conduct of the defense is alleged or proved, and there is no showing that the Government intentionally delayed to gain some tactical advantage over appellees or to harass them." *United States v. Marion*, 404 U.S. at 325, 92 S.Ct. at 455.

Id.

Nevertheless, argument was advanced and was *not rejected* in *Jackson* or in Petitioner's case that once there is a showing of prejudice resulting from pre-indictment delay, a due process violation can be established on demonstration that the delay resulted from something less than deliberate state inaction intended to gain tactical advantage over a defendant. In both cases, the argument was that harm to the defendant from pre-indictment delay fostered by the State's *reckless disregard* for resulting prejudice to the defendant is a sufficient basis to find a due process violation. In Jackson, the court found no need to consider the issue because of its conclusion that the appellant had not established the requisite prejudice. *Jackson*, fn. 2 at 451, 784. In Petitioner's case, the court went further and suggested it might consider the "reckless disregard" standard as the appropriate test:

> Defendant invites this Court to hold that she need not show that the State acted deliberately to delay the case. In this regard, defendant asserts that she should be able to meet her burden by simply showing that the State acted with reckless disregard of the prejudicial impact upon her. See *Jackson* supra, n. 2. If defendant had demonstrated actual prejudice as a result of the delay, we might be inclined to consider defendant's invitation. However, inasmuch as defendant failed to make such a showing, we see no reason to plumb this issue at this time.

(App. 4)

Thus, in Georgia the second of the two questions presented in this petition is unsettled, if for no other reason, because the Supreme Court of Georgia has never reached the issue.

That said, within the following portion of this petition is a showing that the second part of the test traditionally recited by the courts in Georgia (i.e. that the pre-indictment delay was the product of deliberate action by the prosecution designed to gain a tactical advantage) is the result of a common, but not universal, misinterpretation of *Marion* and *Lovasco*.

B. This Court should resolve existing conflicts among the United States Courts of Appeals and among the Highest Courts of the various States in deciding and applying criteria for determining whether prosecutorial pre-indictment delay has violated a defendant's right to Due Process of Law under the Fifth and Fourteenth Amendments.

With the final lines of the opinion of the Court in *Marion*, it is clear that the "actual prejudice" issue can most often be decided only after trial when there is a basis on which the impact of delayed indictment can be measured.[7] Mr. Justice White wrote for the Court:

> Events of the trial may demonstrate actual prejudice, but at the present time appellees' due process claims are speculative and premature.

404 U.S. at 326.

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[7] The district court in *Marion* had dismissed the indictment prior to trial, and the case was considered by the Court pursuant to statute then permitting governmental appeal in any criminal case in which a district court sustained "a motion in bar, when the defendant has not been put in jeopardy." 404 U.S. at 312.

The definitive holding in *Lovasco* is "that to prosecute a defendant following investigative delay does not deprive him of due process, even if his defense might have been somewhat prejudiced by the lapse of time." 431 U.S. at 796. The Court's final commentary was as follows:

> In *Marion* we conceded that we could not determine in the abstract the circumstances in which pre-accusation delay would require dismissing prosecutions. 404 U.S., at 324, 92 S.Ct., at 465. More than five years later, that statement remains true. Indeed, in the intervening years so few defendants have established that they were prejudiced by delay that neither this Court nor any lower court has had a sustained opportunity to consider the constitutional significance of various reasons for delay. *We therefore leave to the lower courts, in the first instance, the task of applying the settled principles of due process that we have discussed to the particular circumstances of individual cases.* We simply hold that in this case the lower courts erred in dismissing the indictment.

431 U.S. at 796-97 (emphasis supplied).

Thus, just as *Marion* consigned due process analysis to "delicate judgment based on the circumstances of each case," *Lovasco* confirms that due process is measured in relation to the circumstances of individual cases. *Id.* Those words defy blanket dogma such as the "equal hindrance" analysis employed by the Supreme Court of Georgia in this case. See pages 15 through 19, above.

This Court's directive has been lost, however, as many courts, including the Supreme Court of Georgia and a majority of United States Courts of Appeals, have focused on a government concession and case specific language in *Marion* in which, after recognizing that statutes of limitation do not fully define a defendant's right to timely indictment, the Court commented:

> Thus, the Government concedes [in its brief to the Court] that the Due Process Clause of the Fifth Amendment would require dismissal of the indictment if it were shown at trial that the pre-indictment delay in this case caused substantial prejudice to appellees' rights to a fair trial and that the delay was an intentional device to gain tactical advantage over the accused.

404 U.S. at 324.

In *Lovasco*, the Court in a footnote recalled the Government's concession in *Marion*:

> In *Marion* we noted with approval that the Government conceded that a "tactical" delay would violate the Due Process Clause. The Government renews that concession here, Brief for United States 32, and expands it somewhat by stating: "*A due process violation might also be made out upon a showing of prosecutorial delay incurred in reckless disregard of circumstances, known to the prosecution, suggesting that there existed an appreciable risk that delay would impair the ability to mount an effective defense,*" *Id.* at 32-33, n. 25. As the Government notes, however, there is no evidence of recklessness here.

431 U.S. at 796 (fn. 17) (emphasis supplied).

While the Court signaled that prejudice caused by intentional misconduct or irresponsible failure to act could be ground for a finding of due process denied, neither *Marion* nor *Lovasco* specifically required either predicate to finding Constitutional injury. Indeed, it appears the Court may not have intended to be specific at all in setting the due process boundaries for delayed prosecution. Consider, for example, the Court's decision in a forfeiture case, *United States v. Eight Thousand Eight Hundred and Fifty Dollars ($8,850) In U.S. Currency,* 461 U.S. 555 (1983). The Court commented on *Lovasco* as follows:

> [T]he Government urges that the standard for assessing the timeliness of the [forfeiture action] be the same as that employed for due process challenges to delay in instituting criminal prosecutions. As articulated in *United States v. Lovasco*, such claims can prevail only upon a showing that the Government delayed seeking an indictment in a deliberate attempt to gain an unfair tactical advantage over the defendant *or in reckless disregard of its probable prejudicial impact upon the defendant's ability to defend against the charges*. . . .
>
> *Lovasco* recognized that the interests of the suspect and society are better served if, absent bad faith *or extreme prejudice*[8] to the defendant, the prosecutor is allowed sufficient time to weigh and sift evidence to ensure an indictment is well-founded. . . .

461 U.S. at 563-64 (emphasis supplied) (citations omitted).

Strangely, in the progression of cases following *Marion* and *Lovasco*, governmental concessions noted by the Court have been read in many lower courts as judicial directives. Confusion has been abundant in that process, causing division among the United States Circuit Courts of Appeals and, in some instances, division within a single circuit and among the highest courts of the various states. That confusion led Justice White to dissent to the denial of certiorari in *Hoo v. United States*, 484 U.S. 1035 (1988). His dissent, in its entirety, is as follows:

> The issue presented by this petition for certiorari is what is the correct test for determining if

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[8] Arguably, the emphasized wording could be read to contemplate a level of prejudice so harmful that standing alone it is a denial of due process akin to the "presumptive prejudice" contemplated in Sixth Amendment speedy trial analysis. *See, e.g., Doggett v. United States*, 505 U.S. 647, 652 (1992).

prosecutorial preindictment delay amounts to a violation of the Due Process Clause of the Fifth Amendment. See *United States v. Lovasco*, [citation]. In this case, the petitioner argued that he was prejudiced by the prosecutorial delay in filing the indictment against him, for it was filed 13 days after he turned 21 years of age, and consequently he was ineligible for the protections of the Federal Juvenile Delinquency Act, 18 U.S.C. § 5301 *et seq.* The Second Circuit held that there was no due process violation because petitioner "made no showing of an improper prosecutorial motive." 825 F.2d 667, 671 (1987). Other Circuits have similarly required a showing of prosecutorial misconduct designed to obtain a tactical advantage over the defendant or to advance some other impermissible purpose in order to establish a due process violation. *United States v. Ismaili,* 828 F.2d 153, 166 (CA3 1987); *United States v. Lebron-Gonzalez,* 816 F.2d 823, 831 (CA1),[9] cert. denied, 484 U.S. 843, and 857, 108 S.Ct. 135 and 166, 98 L.Ed.2d 92 (1987); *United States v. Caporale,* 806 F.2d 1487, 1514 (CA11 1986), cert. denied, 482 U.S. 917, and 483 U.S. 1021, 107 S.Ct. 3191, and 3265, 96 L.Ed.2d 679, and 763 (1987); *United States v. Jenkins,* 701 F.2d 850, 854-855 (CA10 1983). Two Circuits, however, have concluded that intentional misconduct is not the *sine qua non* for a due process violation from prosecutorial preindictment delay, and instead they hold that the proper inquiry is to balance

[9] Other First Circuit decisions suggest the second element of due process analysis is more of a balancing test than stated in *Hoo*. *See, e.g., United States v. Lieberman* in which the court explained "To determine whether due process requires dismissal of a delayed indictment, a court must first consider whether the delay caused the defendant actual prejudice, and *then evaluate the reasons for the delay.*" 608 F.2d 889, 902 (1st Cir. 1980); *accord United States v. DeLeon,* 444 F.3d 41, 57 (1st Cir. 2006).

> the prejudice to the defendant against the Government's justification for delay. *United States v. Valentine,* 783 F.2d 1413, 1416 (CA9 1986); *United States v. Automated Medical Laboratories, Inc.* 770 F.2d 399, 404-405 (CA4 1985). Exemplifying the significant disagreement in the lower courts over the proper test, panels in the Fifth and Seventh Circuits have acknowledged conflicts between decisions from their own Circuits on this issue. *Dickerson v. Louisiana*, 816 F.2d 220, 229, n.6 (CA5), cert. denied, 484 U.S. 956, 108 S.Ct. 352, 98 L.Ed.2d 378 (1987);[10] *United States v. Hollins*, 811 F.2d 384, 387-388 (CA7 1987). The continuing conflict among the Circuits on this important question of constitutional law requires resolution by this Court; I would grant certiorari.

Id.

The two circuits not mentioned in *Hoo* do not lend clarity to the analysis.

The Sixth Circuit adheres to the "tactical delay" standard. See *United States v. Brown,* 959 F.2d 63 (6th Cir. 1992) in which the court made clear:

> This court has consistently read *Lovasco* to hold that "[d]ismissal for pre-indictment delay is warranted only when the defendant shows [1] substantial prejudice to his right to a fair trial *and* [2] that the delay was an intentional device by the government to gain a tactical advantage."

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[10] But see *United States v. Crouch*, in which the Fifth Circuit reviewed the history of its decisions involving pre-indictment delay and wrote:

> We recognize that neither *Marion* nor *Lovasco* is crystal clear on this issue, and each opinion contains some language that can give comfort to either view.

84 F.3d 1497, 1051 (5th Cir. 1996).

Id. at 66; *accord United States v. Greene,* 737 F.2d 572 (6th Cir. 1984).

In the meantime, the most recent pronouncement in the Eighth Circuit Court of Appeals is a bit opaque. In *United States v. Jackson,* 446 F.3d 847 (8th Cir. 2006), the court first turned to the language of the Currency case observing:

> The Supreme Court has recognized that "the interests of the suspect and society are better served if, absent bad faith or extreme prejudice to the defendant, the prosecutor is allowed sufficient time to weigh and sift evidence to ensure that an indictment is well founded."

Id. at 849 (quoting *United States v. Eight Thousand Eight Hundred And Fifty Dollars ($8,850) In United States Currency,* 461 U.S. 555, 563 (1983)). Then, the court employed more familiar language:

> The defendant must establish that: (1) the delay resulted in actual and substantial prejudice to the presentation of his defense; and (2) the government intentionally delayed his indictment either to gain a tactical advantage or to harass him.

Id. at 850 (citing other Eighth Circuit decisions).

Finally, in footnote, the court again cited the Currency case and observed

> We note that the Supreme Court has suggested in dicta that the state-of-mind prong might be satisfied if the government delay was "in reckless disregard of its probable prejudicial impact upon the defendant's ability to defend against the charges."

Id. fn. 2 (quoting 461 U.S. at 563). *But see United States v. Brockman,* 183 F.3d 891 (8th Cir. 1999).

Division among the state courts is illustrated by comparing decisions in Maryland and Pennsylvania in which the states' respective highest court separately engaged in analysis of the relative merits of a "balancing test" and strict application of a "two element test" similar to the recitals by the Georgia courts. The courts came to opposite conclusions.

In what was described as a case of first impression, the highest court in Maryland made an exhaustive review of *Marion* and *Lovasco* as well as decisions from the federal circuits and borrowed language from the Second Circuit to describe a "two part" test as follows:

> [P]resented with a due process claim in the context of a [delay] between the alleged crime and the indictment . . . "[a] defendant bears the 'heavy burden' of proving *both* that he suffered actual prejudice because of the alleged pre-indictment delay *and* that such delay was a course intentionally pursued by the government for an improper purpose."

Clark v. Maryland, 364 Md. 611, 636, 774 A.2d 1136, 1150 (2001) (quoting *United States v. Cornielle*, 171 F.3d 748, 752 (2nd Cir. 1999)). The court adopted that test. 364 Md. at 643, 774 A.2d at 1155.

The Supreme Court of Pennsylvania made an equally exhaustive review of the cases and rejected the two part test.

> We do not follow the view subscribed to by the majority of the federal circuits that a defendant can prevail on a due process claim based on pre-arrest delay *only* where he or she proves actual prejudice *and* that the delay was an intentional device employed by the prosecutor to gain a tactical advantage over the accused. We agree with the . . . reading of *Marion* and *Lovasco* that delay intentionally undertaken by the prosecution to gain a tactical advantage over the defendant is

> one case, but not the only case, where pre-arrest delay would violate due process.

Commonwealth v. Scher, 569 Pa. 284, 310-11, 803 A.2d 1204, 1220 (2002). The Pennsylvania Supreme Court adopted a "balancing test," as follows:

> [T]he test that we believe is the correct one must take into consideration all of the facts and circumstances surrounding the case, including: the deference that courts must afford to the prosecutor's conclusions that a case is not ripe for prosecution; the limited resources available to law enforcement agencies when conducting a criminal investigation; the prosecutor's motives in delaying indictment, and; the degree to which the defendant's own actions contributed to the delay.

Id. at 313, 803 A.2d at 1221.

CONCLUSION

In the years since this Court decided *Lovasco,* the United States Circuit Courts of Appeals and the high courts of the various States when presented with the questions raised in this Petition have scattered their decisions on varied rulings, some never intended by this Court. Because this case offers a sound base for consideration and discussion of both of the questions presented, it affords a rare opportunity to instruct the courts on important Constitutional considerations in weighing prejudice and the source of prejudice to the due process rights.

The Court should grant this petition.

Respectfully submitted,

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APPENDICES

Page

A. Opinion of the Georgia Supreme Court (June 26, 2006) ..... App. 1

B. Opinion of the Superior Court of Dougherty County, Georgia (August 15, 2005) ..... App. 10

C. Judgment of Conviction and Sentence of the Superior Court of Dougherty County, Georgia (February 4, 2003) ..... App. 22

D. Order of the Georgia Supreme Court Denying Motion for Reconsideration (July 27, 2006) ..... App. 24

E. Petitioner's Enumeration of Errors Submitted to the Georgia Supreme Court in her Appeal from the Superior Court of Dougherty County, Georgia (December 16, 2005) ..... App. 25

F. Portion of Petitioner's Brief Submitted to the Georgia Supreme Court in her Appeal from the Superior Court of Dougherty County, Georgia (December 16, 2005) ..... App. 29

G. Portion of Petitioner's Supplemental Brief Submitted to the Georgia Supreme Court in her Appeal from the Superior Court of Dougherty County, Georgia (February 3, 2006) ..... App. 50

632 S.E.2d 90

Supreme Court of Georgia.

HOLTON

v.

The STATE.

No. S06A0385.

June 26, 2006.

Reconsideration Denied July 27, 2006.

George P. Donaldson, III, Misty Garrett Haskins, Perry & Walters, LLP, Albany, for Appellant.

Thurbert E. Baker, Atty. Gen., Edwina M. Watkins, Asst. Atty. Gen., Kenneth Bryant Hodges, III, Dist. Atty., Gregory W. Edwards, Asst. Dist. Atty., for Appellee.

THOMPSON, Justice.

Defendant Tonie Llera Holton was convicted of malice murder in connection with the death of Debra Moss Holton in 1982.[1] She appeals, asserting, inter alia, that the delay in prosecuting this case for two decades prejudiced her defense and violated her due process rights. Finding no reversible error, we affirm.

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[1] The murder occurred on September 25, 1982. Defendant was indicted on October 23, 2002, and charged with malice murder and felony murder, predicated on the underlying felony of aggravated assault. (Defendant was also charged with one count of feticide which was nolle prossed prior to trial.) Trial commenced on January 27, 2003. The jury returned its verdict on January 31, finding defendant guilty of malice murder and felony murder. The trial court sentenced defendant to life in prison for malice murder. The felony murder conviction was vacated by operation of law. See *Malcolm v. State*, 263 Ga. 369, 372(4), 434 S.E.2d 479 (1993). Defendant's timely filed motion for a new trial was denied on August 15, 2005, and defendant filed a notice of appeal on September 2, 2005. The case was docketed in this Court on November 1, 2005, and orally argued on February 13, 2006.

The victim married John Holton on February 28, 1978. They separated approximately four years later and were divorced on May 19, 1982. John continued to live in the marital home. The couple's child lived with or visited John in the home on a regular basis. At about the time of the divorce, John met the defendant. He offered to let defendant stay in his house and he gave her a key. Thereafter, on June 4, 1982, John and defendant were married; they continued to live in John's house.

On the morning of September 25, 1982, the victim went to John's house. (Some of the victim's clothes and personal effects were still there.) She rang the doorbell several times and placed a note on the screen door. Defendant came to the door with a sawed-off shotgun. She fought with the victim in the front yard; then she fatally shot her. An autopsy revealed that the victim was five months pregnant.

Defendant acknowledged that she shot the victim, but claimed the gun discharged accidentally. According to defendant, the victim attacked and scratched her. Then, as they fought, the victim pulled a clump of her hair, causing defendant to fall back through the doorway of the house, discharging the gun.

The State introduced evidence that defendant and the victim had a heated telephone conversation within two days of the shooting. It was also established that the night before the shooting, the victim went to a bar where defendant worked; that when the victim entered the bar, defendant threw a glass ashtray at her and told her to "come get [her] stuff"; and that a bouncer then escorted the victim out of the bar.

John testified that defendant expressed no remorse on the day of the shooting and that several months later she boasted that she "blew the bitch away." John added that defendant dispassionately said she gleaned a leather jacket from the victim's death.

Finally, the State presented the testimony of a firearms expert who tested the shotgun and opined that the trigger pull required six pounds of pressure and that the shotgun would not fire accidentally. It also introduced the testimony of an expert who testified that the shotgun spray pattern indicated that the victim was shot from a distance of 14 feet; and that the pattern was inconsistent with defendant's version of events.

1. The evidence was sufficient to enable any rational trier of fact to find defendant guilty beyond a reasonable doubt of malice murder. *Jackson v. Virginia,* 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

2. Although defendant was arrested in 1982, the grand jury declined to indict her at that time and the case was closed. Nearly 20 years later, a friend of the victim's family contacted the district attorney's office to inquire about the case. The district attorney's office decided to reopen the investigation and, in late 2002, defendant was indicted.

Defendant claims she was denied her due process rights because the State delayed the prosecution for 20 years. In order to prevail on this claim, defendant must show (1) that the delay actually prejudiced the defense *and* (2) that the prosecution deliberately delayed the case in order to gain a tactical advantage. *Jackson v. State,* 279 Ga. 449, 450(2), 614 S.E.2d 781 (2005); *Wooten v. State,* 262 Ga. 876, 878(2), 426 S.E.2d 852 (1993). Defendant has

not made either showing. True, several witnesses died in the intervening years[2] and some pieces of evidence were missing[3] But this hindered the prosecution as much as defendant; it is the type of prejudice inherent in any extended delay. See *Jackson v. State, supra*; *Roebuck v. State,* 277 Ga. 200, 205, 586 S.E.2d 651 (2003). And even if defendant could show actual prejudice as a result of the delay, it cannot be said that the delay was the product of deliberate action by the State.

Defendant invites this Court to hold that she need not show that the State acted deliberately to delay the case. In this regard, defendant asserts that she should be able to meet her burden by simply showing that the State acted with reckless disregard of the prejudicial impact upon her. See *Jackson, supra*, n. 2. If defendant had demonstrated actual prejudice as a result of the delay, we might be inclined to consider defendant's invitation. However, inasmuch as defendant failed to make such a showing, we see no reason to plumb this issue at this time. *Id.*

3. The trial court did not err in permitting an officer to testify that defendant "had a few small scratches, very minor, around her face" and that they were not "something that would be gained in a scuffle." "[T]he opinion given by the [officer] was a conclusion or opinion based upon her personal observation of a physical fact and not a[n] [expert] opinion. Description of one's physical observations and opinions logically flowing therefrom have long been

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[2] These included defendant's brother, a lead detective, and an EMT who arrived at the scene.

[3] The shotgun and wadding had been lost. However, it had been tested shortly after the shooting and the firearm expert who conducted the tests testified.

admissible in this state." *Robinson v. State,* 168 Ga.App. 569, 571(2), 309 S.E.2d 845 (1983). See also *Munsford v. State,* 235 Ga. 38, 42, 218 S.E.2d 792 (1975); *Mobley v. State,* 212 Ga.App. 293, 296(2), 441 S.E.2d 780 (1994).

4. Defendant's brother, Mark Llera, was in the house when the shooting took place. Because he was deceased at the time of trial, the State sought permission to introduce a statement made by Llera under the necessity exception to the hearsay rule. The statement was made to defendant's husband, John, approximately one month after the shooting. John, who prompted the conversation, testified as follows: "It didn't make sense to me that a guy [Llera] being a medic in the army, why he would let [the victim] bleed out when he could stop that. So my question to him was, how did this come about; how did it happen that she lay there and bled out with you in the house. And he said, well [defendant] slammed the door and said, 'leave the bitch lay.' " The trial court admitted Llera's statement over defendant's objection that the evidence was hearsay.

Under OCGA § 24-3-1(b), hearsay evidence is admissible in "specified cases from necessity." To be admissible under this hearsay exception, our courts require that the declarant be dead or unavailable to testify and that there be particular guarantees of trustworthiness. In addition, the statement must be relevant to a material fact and more probative of that fact than other evidence that may be procured and offered. *Holmes v. State,* 271 Ga. 138, 139, 516 S.E.2d 61 (1999). Whether a statement was accompanied with particular guarantees of trustworthiness is a matter which lies in the discretion of the trial court. *Myers v. State,* 275 Ga. 709, 712, 572 S.E.2d 606 (2002). "The test is whether 'the declarant's truthfulness is so clear from the

surrounding circumstances that the test of cross-examination would be of marginal utility.'" *Chapel v. State,* 270 Ga. 151, 155, 510 S.E.2d 802 (1998).

Defendant asserts the trial court abused its discretion in admitting Llera's statement because it was not shown to be trustworthy. We are compelled to agree. The trial court opined that Llera's statement was admissible because Llera and John were in-laws, they were speaking in a "non-confrontational situation," and defendant was living in John's house. However, the mere fact that Llera and John were in-laws does not point to the reliability of Llera's statement. See *Myers v. State, supra* at 713, 572 S.E.2d 606 (existence of familial relationship alone does not establish trustworthiness). Likewise, the fact that defendant was living under John's roof and Llera and John's discussion was non-confrontational provides little, if any, guidance. More telling are the facts that John only knew Llera for a few months when Llera made the statement to him; that there was no evidence that Llera confided in John, or turned to him for help with his personal problems; and that John himself said he only trusted Llera "with some reservations." Compare *Ward v. State,* 271 Ga. 648, 650, 520 S.E.2d 205 (1999) (witness and declarant were "good friends" for many years and had a "trusting," confidential relationship). And, perhaps most importantly, is the fact that Llera had given John "conflicting" versions of what transpired.[4] Compare *Azizi v. State,* 270 Ga. 709, 712, 512 S.E.2d 622 (1999) (consistent statements made to sisters were reliable) with *Mallory v. State,* 261 Ga. 625,

[4] For example, Llera told John initially that he was asleep when the incident took place. It was Llera's conflicting accounts which prompted John to question Llera further.

628, 409 S.E.2d 839 (1991) (inconsistent statements to son and friend were unreliable). Thus, considering the totality of the circumstances, as we are bound to do, *Fetty v. State,* 268 Ga. 365, 367(4), 489 S.E.2d 813 (1997), it is not Llera's reliability, but his unreliability which comes to the fore.

However, it is highly probable that any error in admitting Llera's statement did not contribute to the judgment of conviction.[5] The statement was introduced to show defendant's state of mind at the time of the shooting and demonstrated that defendant bore ill will toward the victim. This was established by other evidence that the victim was having trouble getting her belongings back from defendant and that defendant threatened her, saying she could shoot her and get away with it; that defendant threw an ashtray at the victim the night before the shooting; that on the day of the shooting, defendant expressed no remorse, was very calm, and even "jovial"; and that defendant later boasted that she "blew the bitch away."

5. Defendant asserts the trial court erred in denying defendant's motion for new trial because the prosecution failed to prove assertions it made in its opening statement. More specifically, defendant contends the prosecution did not back up its claims that defendant was motivated by jealousy and that evidence had been tampered with. This contention is without merit.

The prosecution presented evidence which would have led the jury to believe that defendant, her husband and

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[5] Because Llera's statement to John is not testimonial in nature, it does not implicate the confrontation clause of the federal and state constitution; accordingly, we use the "highly probable" harmless error approach. *Gay v. State,* 279 Ga. 180(2), 611 S.E.2d 31 (2005).

the victim were involved in a love triangle and that the screen door of the house had been removed after the shooting. Although the prosecution's opening statement may have painted with a broad brush, it was not misleading.

In *Alexander v. State,* 270 Ga. 346(2), 509 S.E.2d 56 (1998), we held that opening statements by the State should be confined to an outline of what the State expects admissible evidence will prove at trial, and that even if the opening statement departs from [that outline], a conviction will not be reversed if the State acted in good faith and if the trial court instructed the jury that the State's opening statement is not evidence and has no probative value. We need not consider the good faith of the prosecutor in this case, or the effect of the trial court's instruction that opening statements are not evidence, because the prosecution's opening statement was not subject to the argument raised on appeal. Our review of the transcript reveals that the prosecution presented evidence intended to establish every one of the matters which [defendant] enumerates as improper. Thus, the present case is unlike Alexander, where the prosecution's opening statement described in detail alleged connections between the crime and gang activities, but there was no attempt to prove the gang-related assertions. By contrast, the prosecuting attorney in the present case set forth in the opening statement what the State intended to prove, and then adduced evidence aimed at proving the specifics of the opening statement's outline. No error appears in regard to the prosecution's opening statement.

Bellamy v. State, 272 Ga. 157, 160, 527 S.E.2d 867 (2000).

Judgment affirmed.

All the Justices concur.

IN THE SUPERIOR COURTS OF GEORGIA
COUNTY OF DOUGHERTY

STATE OF GEORGIA

vs. CASE # 02R1207

TONIE LLERA HOLTON
(aka Tonie Llera Holton Brady)
Defendant

ORDER REGARDING DEFENDANT'S
MOTION FOR NEW TRIAL

(Filed Aug. 15, 2005)

This case stems from a fatal shooting in the Putney community of Dougherty County, Georgia on the morning of September 25, 1982. To summarize the procedural history, defendant was arrested in September 1982 following the shooting deaths of Debbie Holton and her unborn child. The decedent was the ex-wife of John Holton. Defendant was married to Mr. Holton at the time of the shooting, which took place at the Holton home. This was the same house formerly occupied by the decedent. After arrest, Defendant's case was taken before the grand jury, which declined to indict. While unclear in this record if the warrant was formally dismissed, it is clear that the prosecution discontinued for nearly two decades. Defendant was not under restraint or prosecution during this time.

In either 2001 or 2002, the current District Attorney's office was contacted about re-opening this case.[1] The case

[1] DA Chief Investigator James Paulk testified that he was called by David Perry, an area attorney that employed Ms. Lisa Johnson. (T. 699). She is a friend of decedent's family and had been talking to Mr. Perry about the case. At that point, Mr. Paulk requested previously

(Continued on following page)

was indicted by the grand jury on October 23, 2002.[2] The Court issued a bench warrant on October 24, 2002. Defendant turned herself in with her attorney. The Court held a hearing and granted her a bond on October 25, 2002. On November 8, 2002, defense counsel filed a statutory demand for speedy trial. He later withdrew this demand in writing on November 12, 2002. Defense counsel moved to continue the case from the first week of the January 2003 Term. This request was granted. The case was tried to a jury the week of January 27, 2003.[3]

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closed files from the Dougherty County police and started looking into the case. The Court notes that since the time the shooting took place (1982), the Dougherty Circuit has had three District Attorneys. The District Attorney at the time of the shooting was deceased by the time the investigation was re-opened.

[2] The indictment was returned during the September 2002 term of Dougherty Superior Court which ended on the second Monday of November when the November term began. However, by October 23, 2002, there were no trial jurors available. The indictment was for one count of Malice Murder, one count of Felony Murder, and one count of Feticide. Prior to trial, the State moved to nolle prosequi the Feticide charge because the incident predated that statute's effective date. Such order was signed and the jury was not presented with Count Three – Feticide. The Court had lengthy discussions on the record with counsel about charging on lesser offenses of Voluntary Manslaughter and Involuntary Manslaughter, in order to avoid sequential charge issues. However, possible statute of limitations arguments about same were rendered moot because the jury returned a guilty verdict on Malice Murder which has no statute of limitations per OCGA 17-3-1(a).

[3] As noted previously, defendant was indicted the last few days of the September Term after all trial jurors were excused. The case was tried within two terms of Court during the January 2003 Term. Defendant was indicted October 23, 2002; arrested October 24, 2002; granted a bond on October 25, 2002; waived arraignment on December 2, 2002; and went to trial on January 27, 2003. Thus, from the date of indictment until trial was a span of 96 days.

On January 31, 2003, the jury returned a guilty verdict on the Malice Murder and Felony Murder charges. The Court merged Count Two Felony Murder into Count One Malice Murder for purposes of sentencing. Defendant was sentenced to a Life in Prison sentence, on January 31, 2003. On February 17, 2003, counsel for defendant filed with the Clerk of Court a written motion for new trial. No hearing was requested and undersigned was not made aware of the pendency of such motion.[4] When undersigned became aware that such motion was pending, an order was entered scheduling a hearing.[5] After hearing oral presentations from both attorneys in the case, the Court allowed a briefing period.[6] The Court has considered the entire record, including the trial transcript, the briefs and the arguments of counsel.

Defense counsel argues several grounds in support of the motion for new trial.[7] A substantial portion of the argument focuses on two topics. The defense argues that the verdict was contrary to principles of justice and equity in part because the prosecutor made remarks about issues in his opening statement that he did not support by evidence presented during the case. The defense also argues that the twenty year delay between the shooting

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[4] The multiple volume trial transcript was prepared by the court reporter and filed with the Clerk of Court on July 31, 2003.

[5] See order dated November 11, 2004. The hearing was originally scheduled for December 21, 2004. It was continued and completed at a second session.

[6] Defense counsel filed briefs dated January 28, 2005 and April 27, 2005. The State filed a brief dated March 14, 2005.

[7] See OCGA 5-5-20 (verdict contrary to evidence and justice); OCGA 5-5-21 (verdict against the weight of the evidence); and OCGA 5-5-25 (other grounds).

and the prosecution of the case violates defendant's due process rights.

As to the opening statements issues, the Court noted to the lawyers an expectation that evidence presented would correlate to the opening statements.[8] On at least two occasions, the Court instructed the jury that the opening statements were not evidence.[9]

The defense argues the prosecutor stated in opening statement that he expected the evidence to show the two women (defendant Tonie Holton and decedent Debbie Holton) shared John Holton as a lover and a husband[10] but that the evidence did not support this claim. However, review of the opening remark notes the central theme by the prosecution is a jealousy motive. The evidence does reflect that Mr. Holton and decedent were divorced in May of 1982. They had a minor child together that continued to reside at times in the former marital home with her father. The evidence presented also showed that in the four month period between the May 1982 divorce and the September 1982 shooting, defendant began living in the former marital residence with John Holton and they got married. There was also evidence presented that there had been a controversial phone call between the women[11] and that some of decedent's clothes and personal belongings

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[8] T.11.

[9] T. 132, 1065.

[10] T.147.

[11] Mona Moss, decedent's sister-in-law, testified that she heard decedent talking on a pay phone to defendant within two days prior to the shooting and that decedent was upset. (T.314-316). Ms. Moss testified decedent had stated to her that the unborn child was John Holton's baby. (T.322).

were still in the house, the scene of the shooting.[12] While there was disputed evidence about when it became known, decedent was several months pregnant at the time of the shooting.[13] John Holton testified at trial he did not know that he was supposedly the father of the unborn child until after the shooting.[14] However, there was testimony presented by state's witnesses that could have been interpreted to the contrary.[15]

The defense argues that the prosecutor noted in opening statement that the evidence would show that the screen door on the front of the house was removed[16] to raise the specter of evidence tampering but did not present evidence of same.[17] Decedent's sister testified she had been in the house over time and that when she went there two or three weeks after the shooting, the screen door was

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[12] While the defense hotly disputed the testimony, witnesses were presented by the state that there had been a confrontation between the two women the night before the Saturday morning shooting. Lisa Johnson, a friend of decedent and her family, testified that defendant threw a glass ashtray at decedent at a nightclub where defendant worked. (T.336). Nightclub bouncer Vic Martin testified he saw the ashtray fly and heard defendant tell decedent to "come get your stuff". (T. 352).

[13] The pathologist that performed the autopsy testified decedent was about five months pregnant. (T. 217).

[14] T.402.

[15] See T. 237;322;493. While this was in dispute, Mona Moss also testified that on one occasion after Mr. Holton had married defendant, she went with decedent to see Mr. Holton about issues regarding their minor daughter. She testified that Mr. Holton and decedent hugged and kissed. (T.312).

[16] The shooting incident took place in this front door/ front yard area of the house.

[17] T. 150;163.

gone.[18] The next door neighbor testified that on the day of the shooting, but after the police left the scene, she thinks she saw a man remove the screen door.[19] There was also disputed testimony about the possible manufacturing of evidence regarding a clump of hair that defendant claimed decedent pulled from her head at the time of the shooting.[20]

As to the issues raised regarding the prosecutor's opening statement, the Court has reviewed the record and the case authority cited by counsel.[21] As noted, at least twice during the proceedings, the Court instructed the jury that the opening statements were not evidence. The Court finds that the prosecutor did not fail to act in good faith in his preliminary remarks compared to what he actually presented in evidence. In *Alexander,* the Supreme

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[18] Testimony of Betty Butler (T.303-304). See also testimony of decedent's sister Martha Nobles (T.245) that the screen door was there two weeks before the shooting but missing afterwards.

[19] Testimony of Hilda Lowery (T.497). On cross-examination by defense counsel, she admits that she did not mention the screen door in her statement given to the police (T. 519).

[20] Police officer Jamison testified about the hair sample looking like it came out of a brush and that defendant's hair was not messed up at the scene. (T. 560-562). The testimony of Jackie Lowery, a neighbor, was that she was in her yard and saw no hair pulling at the time of the incident. (T.536). One of the aspects of the trial of this case that does not translate well to the written transcript is the presentation of Ms. Jackie Lowrey's testimony. She appeared and testified live at trial. She is now an adult in her late twenties. At the time of the 1982 shooting, she was a 7 ½ year old neighbor child. When her audiotaped statement given to the police in 1982 was played over the courtroom speakers, the now adult Ms. Lowery was on the witness stand. Yet, the tape recording was her voice as a 7 ½ year old child. Her child voice and adult visual appearance made for an interesting juxtaposition.

[21] See, *Alexander v. State,* 270 Ga. 346 (1998); *Parker v. State,* 277 Ga. 439 (2003).

Court reversed where the prosecutor made highly prejudicial remarks in opening statement about the drive by shooting being gang related but offered no evidence to tie the incident to gang activities. In the current case, the prosecutor pointed out that the State's theory was that the shooting was motivated by jealously [sic]. While the defense contends there was a lack of evidence to prove, for example, that Tonie Holton knew at the time that Debbie Holton was pregnant with John Holton's child, the State did put forth evidence from several witnesses to outline its contentions of conflict between the women. While much of this testimony was disputed, the prosecutor put forth testimony that decedent divorced John Holton and within the four month period until the shooting, defendant had moved into her former home and married her ex-husband. Decedent's minor daughter was in and out of this home. Decedent still had personal items and clothing in the home now occupied by defendant. There was evidence of a phone call between the two women within a few days of the shooting. There was evidence, albeit disputed, of a confrontation between the two women the preceding night in a bar. The jury heard and weighed all of this evidence presented by the state in an effort to show hostility and jealousy.[22] The Court finds that any variance between the

[22] The jury, as trier of fact, not only heard and considered the evidence and testimony of nearly thirty witnesses, it also had the opportunity to view the witnesses' manner of testifying. As in any case, witness credibility was presented as an issue for jury consideration. In this case, there was no real dispute as to when and where that the shooting occurred. There is no dispute that the shooting took place with a shotgun and that defendant had the shotgun when the shooting took place. Most of the dispute centered around the mechanics of a possible struggle at the time decedent was shot and the intent, or lack thereof, of defendant Tonie Holton. The jury heard both Tonie Holton's tape recorded statement (played without objection) and her live testimony at

(Continued on following page)

opening statement and the state's evidence was not prejudicial to the defendant given the totality of the evidence presented for jury consideration.

Defense counsel argues that the twenty year delay between the incident and trial prejudiced the defense and violated his client's due process rights. There were some missing pieces of evidence.[23] Some witnesses had died in the intervening twenty years.[24] While conceding that the Murder charges have no statute of limitations, counsel argues the issue from a constitutional perspective.[25]

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trial. They weighed her credibility and her version of events. They watched her manner of testifying. Some things do not not [sic] translate well to a transcript. Even defense counsel conceded in oral arguments on this motion that at times during her statement and testimony, defendant seemed to be jovial or giggled at seemingly inappropriate times. (Compare testimony of police officer Jamison at scene T. 560). The Court has no way of knowing how the jury evaluated all of this in connection with all the evidence it received. However, as the trier of fact, the jury was in a position to evaluate all of this information.

[23] For example, the shotgun was not available by the time the case was indicted in 2002. It had been seized by police and tested at the crime laboratory shortly after the shooting. Testimony was presented by Dr. James Howard, now retired from the GBI crime lab, about his testing of the actual weapon.(T. 590).

[24] Mark Llera, defendant's brother who was in the house on the morning of the shooting, is now deceased. Capt. Graham, the detective from the Dougherty County Police Department, and one of the paramedics on the scene are now deceased. The Court did allow both sides some opportunity to present information and reports by these witnesses under hearsay necessity exceptions.

[25] OCGA 17-3-1(a). As noted in footnote 2 herein, since the State pursued both a Malice Murder count and a Felony Murder count, the Court charged the jury on Voluntary and Involuntary Manslaughter. The Court did so even though the defense reserved the right to argue for a dismissal on statute of limitations grounds if a guilty verdict was returned on those charges. The State argued that the statute of limitations would not bar such a verdict Nonetheless, these possible

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As defense counsel notes at page two of his April 2005 brief, the analysis is not per se a Sixth Amendment speedy trial issue. Only 96 days elapsed between indictment and trial.[26] Defendant had not been under any prosecution or charges for nearly twenty years, until the case was re-opened and indicted in the fall of 2002.

The Court has reviewed the arguments of defense counsel and the cases cited.[27] This issue was recently addressed by the Georgia Supreme Court in *Jackson v. State*.[28] Mr. Jackson was indicted in 1999 for a 1975 shooting death. While Mr. Jackson had been named as a suspect in 1982, he was not charged and indicted until another witness came forward in 1998. He contended the twenty four year lapse between the incident and the indictment violated his due process rights. The Court held that to find a due process violation where a delay precedes arrest and indictment, the courts must find *both* that the

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statute of limitations issues became moot when the jury returned a guilty verdict as to Malice Murder.

[26] It should be noted that Defendant was arrested in 1982 but not indicted. The prosecution was discontinued for nearly twenty years before being reopened and indicted in late 2002. As to this procedural fact, this case is analogous to *Wooten v. State*, 262 Ga. 876 (1993). In *Wooten*, the defendant was arrested within a month of the 1978 killing. However, defendant was not indicted because the case was "dropped". *Wooten* at 876. He was not indicted until 1990. The Court in *Wooten* analyzed the situation from a due process-standpoint and cited *United States v. McDonald*, 456 U.S. 1 (1982) for the proposition that such due process analysis is proper where (as here) an individual is arrested, the charges dropped, and the person is later arrested or indicted for the same offense.

[27] See, *United States v. Marion*, 404 U.S. 307 (1971); *Barker v. Wingo*, 407 U.S. 514 (1972); *United States v. Lovasco*, 431 U.S. 783 (1977).

[28] *Jackson v. State*, 279 Ga. 449 (decided June 16, 2005).

delay caused actual prejudice to the defense *and* that the delay was the product of deliberate action by the prosecution designed to gain a tactical advantage.[29]

The Court finds that the defense cannot prove either prong of this due process test. There is no evidence that the prosecutor sat on the case from 1982 until 2002 to gain a tactical advantage. As noted, the current District Attorney was not in office at the time and is the third Dougherty District Attorney since 1982.[30] The only evidence in the record is that a local attorney that employed a friend of the victim approached the current District Attorney's Chief Investigator and asked him to look at the case.

Additionally, the defense cannot prove the first prong of the due process test. Any prejudice to the defense case that results merely from the passage of time cannot create the requisite prejudice.[31] There were pieces of evidence no longer available (shotgun and wadding) and certain witnesses were dead by the time of trial. While the defense claims this as an impediment to the preparation of the defense, the prosecutor faced similar issues. Notably, the prosecutor faced the burden of proof beyond a reasonable doubt and had to deal with not being able to introduce the weapon to the jury. The prosecutor did not have the lead detective available to testify.

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[29] *Jackson* at 449 citing *Wooten v. State*, 262 Ga. 876 (1993).

[30] The current District Attorney was probably still in high school in 1982.

[31] *Roebuck v. State*, 277 Ga. 200 (2003) (affirming a murder conviction where the defendant was not indicted for over thirteen years after the stabbing).

As noted previously, despite the twenty year lapse between the shooting and the indictment, both sides were able to put nearly thirty witnesses on the stand at trial. Both sides were able to put neighbors on the stand that were in their yards or looking out the windows when the incident took place. Witnesses that were on the scene, including an EMT and police officer, were questioned and cross-examined at trial. Both sides presented expert witnesses. The Court also notes that the most significant issue in the case was that of defendant's criminal intent or the lack thereof. The defense certainly presented evidence of the mechanics of the shooting to argue that the gun went off accidentally in a struggle between the women. However, this was not a case where there was an issue of when or where the shooting took place. There was no issue about what weapon was used. There was no dispute as to whether decedent brandished a gun in the confrontation. There was no issue about the identity of the two parties present at the time of the shooting (decedent and defendant). There is no dispute that defendant came to the front door holding a shotgun.

What this case largely turns on is whether the jury believed defendant's testimony that she did not intend to shoot decedent. In that regard, the jury not only heard defendant's tape recorded statement, they received her testimony from the witness stand at trial. They not only listened to her testimony but observed her manner of testifying. They were presented with legal instructions, including those regarding credibility and criminal intent, and given the possibility of returning a verdict on voluntary or involuntary manslaughter charges. They returned a guilty verdict on Malice Murder.

The Court has reviewed the entire record and all of the grounds asserted by defense counsel seeking a new trial. The Court finds that no grounds exist for the granting of a new trial in this case.

Defendant's motion for new trial is denied.

So ordered, August 15, 2005.

/s/ Stephen S. Goss
Stephen S. Goss, Judge
Superior Courts of Georgia
Dougherty Judicial Circuit

CERTIFICATE OF SERVICE

I have today served a true copy of this order on counsel of record as follows:

VIA BUILDING ~~COURIER~~:
Greg Edwards, Esq.
Chief Assistant DA

VIA FAX and U.S. MAIL, Postage prepaid:

George P. Donaldson III, Esq.
Perry & Walters LLP
P.O. Box 71209
Albany, GA 31708

via fax 229-436-1417 (Total 10 pages)

August 15, 2005.

/s/ Stephen S. Goss
Judge of Superior Courts

IN THE SUPERIOR COURTS OF GEORGIA
COUNTY OF DOUGHERTY

STATE OF GEORGIA

vs. CASE # 02R1207

TONIE LLERA HOLTON BRADY

Defendant

W/F DOB: 05/17/55

SSN: 259043698

JUDGMENT AND SENTENCE

(Filed Feb. 4, 2003)

Defendant was tried before a jury January 27-31, 2003. The jury returned a guilty verdict on Count One Malice Murder and a guilty verdict on Count Two Felony Murder. Both counts involved the death of the same victim. Accordingly, Count Two Felony Murder merges for sentencing purposes.

As to Count One Malice Murder (Count Two Felony Murder merged therein), the Court sentences Defendant to serve LIFE in PRISON. She is remanded to the custody of the Georgia Department of Corrections and is to be held in the Dougherty County Jail by the Sheriff until the appropriate representative of the Georgia Department of Corrections takes custody of her for placement in the State of Georgia penal system.

So ordered and adjudged as pronounced in open court on January 31, 2003 and reduced to writing February 4, 2003.

/s/ Stephen S. Goss
Stephen S. Goss,
Superior Court Judge
Dougherty Judicial Circuit

SUPREME COURT OF GEORGIA

Case No. S06A0385 Atlanta, July 27, 2006

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:

TONIE LLERA HOLTON v. THE STATE

Upon consideration of the Motion for Reconsideration filed in this case, it is ordered that it be hereby denied.

SUPREME COURT OF THE STATE OF GEORGIA

Clerk's Office, Atlanta

I hereby certify that the above is a true extract from the minutes of the Supreme Court of Georgia.
Witness my signature and the seal of said court hereto affixed the day and year last above written.

Sherie M. Welch,-Clerk

APPEAL DOCKET NUMBER: S06A0385

IN THE SUPREME COURT OF GEORGIA

TONIE LLERA HOLTON,

APPELLANT,

v.

STATE OF GEORGIA,

APPELLEE.

APPEAL FROM THE SUPERIOR COURT OF DOUGHERTY COUNTY

APPELLANT'S ENUMERATION OF ERRORS

GEORGE P. DONALDSON, III
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APPEAL DOCKET NUMBER: S06A0385

APPELLANT'S ENUMERATION OF ERRORS

PART ONE: JURISDICTIONAL STATEMENT

This Supreme Court of Georgia, rather than the Court of Appeals for the State of Georgia, has jurisdiction of this case on appeal for the reason that it is a murder conviction and jurisdiction for murder conviction appeals is exclusively reserved to the Supreme Court of Georgia, as provided in The Constitution of the State of Georgia, Article VI, Section VI, Paragraphs II and III.

PART TWO: ENUMERATION OF ERRORS

A. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN DENYING APPELLANT'S MOTION FOR NEW TRIAL BASED ON THE STATE'S IMPROPER OPENING STATEMENT IN WHICH THE PROSECUTOR IN BAD FAITH ADVISED THE JURY THAT THE STATE EXPECTED TO INTRODUCE CERTAIN EVIDENCE PREJUDICIAL TO DEFENDANT'S CASE, KNOWING FULLY THAT NO SUCH EVIDENCE EVER EXISTED.

B. THE TRIAL COURT COMMITTED HARMFUL ERROR IN APPLYING THE RULE OF NECESSITY TO ADMIT INTO EVIDENCE, OVER APPELLANT'S OBJECTION, HEARSAY TESTIMONY REGARDING ALLEGED STATEMENTS AND ACTIONS OF APPELLANT AFTER DEBRA HOLTON WAS SHOT.

C. THE TRIAL COURT ERRED IN PERMITTING OPINION TESTIMONY FROM A WITNESS NOT QUALIFIED AS AN EXPERT TO ESTABLISH THAT WOUNDS OR SCRATCHES ON APPELLANT'S FACE FOLLOWING THE INCIDENT IN WHICH DEBRA HOLTON WAS SHOT WERE NOT THE RESULT OF "A SCUFFLE."

D. THE TRIAL COURT COMMITTED HARMFUL ERROR IN DENYING APPELLANT'S POST TRIAL PRAYER FOR DISCHARGE BASED ON THE LOSS OF HER RIGHT TO DUE PROCESS BECAUSE OF INORDINATE AND PREJUDICIAL DELAY IN THE PROSECUTION OF THIS CASE.

Respectfully submitted this 16th day of December, 2005.

PERRY & WALTERS, LLP

/s/ George P. Donaldson, III
GEORGE P. DONALDSON, III
State Bar I.D. 225500

/s/ Misty G. Haskins
MISTY GARRETT HASKINS
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Post Office Box 71209
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229/439-0620

CERTIFICATE OF SERVICE

The undersigned, Misty G. Haskins and George P. Donaldson, III, do hereby certify that they are attorneys authorized to practice law in the State of Georgia; that they are the attorneys of record for Tonie Llera Holton, Appellant in the foregoing matter; and that they have this

day served counsel for Appellee with an exact copy of the foregoing Appellant's Enumeration of Errors by depositing the same in the United States Mail in an envelope affixed with adequate postage to ensure delivery and bearing the following addresses:

Hon. Thurbert E. Baker
Ms. Edwina M. Watkins
Office of the Attorney General
State of Georgia
40 Capitol Square, SW
Atlanta, Georgia 30334-1300

Mr. Kenneth B. Hodges, III
Mr. Gregory W. Edwards
Office of the District Attorney
Dougherty County, Georgia
Post Office Box 1827
Albany, Georgia 31702-1827

This 16th day of December, 2005.

PERRY & WALTERS, LLP

/s/ George P. Donaldson, III
GEORGE P. DONALDSON, III
State Bar I.D. 225500

/s/ Misty G. Haskins
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APPEAL DOCKET NUMBER: S06A0385

IN THE SUPREME COURT OF GEORGIA

TONIE LLERA HOLTON,

APPELLANT,

v.

STATE OF GEORGIA,

APPELLEE.

APPEAL FROM THE SUPERIOR
COURT OF DOUGHERTY COUNTY

APPELLANT'S BRIEF

(Filed Dec. 16, 2005)

GEORGE P. DONALDSON, III
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* * *

D. THE TRIAL COURT COMMITTED HARMFUL ERROR IN DENYING APPELLANT'S POST TRIAL PRAYER FOR DISCHARGE BASED ON THE LOSS OF HER RIGHT TO DUE PROCESS BECAUSE OF INORDINATE AND PREJUDICIAL DELAY IN THE PROSECUTION OF THIS CASE.

In connection with her Motion for New Trial, Appellant also sought to be discharged because the delay in bringing the indictment against her caused irreparable harm to her ability to defend herself. (R-233-237) Relying on this Court's very recent decision in *Jackson v. State,* 279 Ga. 449 (2005), the trial court denied the relief on findings that Appellant "cannot prove" two requisite elements, namely (1) "actual prejudice" to the defense caused by the twenty year lapse between the death of Debra Holton and Appellant's 2002 indictment and (2) deliberate action by the prosecution causing the delay for the purpose of gaining tactical advantage. (R-274)[53]

Appellant asserts error in the trial court's ruling because actual prejudice to the defense was amply demonstrated and because the prosecution's delay in seeking an

[53] There is an irony in the following argument because Appellant maintains that her circumstance satisfies the "two prong test" of *Jackson v. State*, while at the same time, submits that the "test" recited in *Jackson v. State* and earlier Georgia decisions is more burdensome to Appellant than authorized by the United States Supreme Court in determining whether Appellee's twenty year delay in bringing her case to the grand jury denied her a fair trial.

indictment was in reckless disregard of the probable prejudicial impact on Appellant's ability to defend against the charges. See *Jackson v. State* 279 Ga., at 451.

Before addressing the substantive issues pertaining to the denial of fair trial due to delay in bringing the indictment, there is a procedural anomaly to be attended to. Unlike a defense based on the running of a Statute of Limitations or harm from a post indictment delay[54] in bringing a ease to trial, prejudice to a defendant's due process eights occasioned by the ***lapse of time prior to indictment*** is largely immeasurable until there has been a trial and "actual prejudice" to the defendant. Noting that only "actual prejudice makes a due process claim concrete and ripe for adjudication" the United States Supreme Court has observed that such "claims are speculative and premature" until "actual prejudice" is demonstrated and that it may require the "events of [a] trial" to make that demonstration. *United States v. Lovasco,* 431 U.S. 783, 789 (1977) (citing *United States v. Marion,* 404 U.S. 307, 326 (1971)). In short, until Appellant was subjected to trial, it was impossible to comprehend the "actual prejudice" that would be presented with the opportunistic substitution of speculation and perhaps fabrication for long lost evidence. Until the silence surrounding the prosecution was broken in the courtroom, Appellant had no reason to know that

[54] Once a person is submitted to the criminal process, there are pretrial restrictions imposed and, presumably, a greater need for expediency. From that point forward the "speedy trial" provisions of the Sixth Amendment are engaged. See *Barker v. Wingo,* 407 U.S. 514 (1972), discussed infra. As will be seen below some, but not all, of the elements of a speedy trial issue also pertain in a due process analysis under the Fifth and Fourteenth Amendments. See *United States v. Ricardo Valenzuela-Bernal,* 458 U.S. 858 (1982).

the case to be presented by Appellee was not the same case forecasted in discovery.

In Georgia, "actual prejudice" has proved an illusive standard for those aggrieved by inordinate delay between an alleged crime and the arrest or indictment that follows. To date, no one has demonstrated "actual prejudice" in such cases. That result is likely the product of a seeming incongruity in the cases where the issue has been raised. The discord is perhaps best illustrated in a single paragraph from this Court's decision in *Roebuck v. State,* 277 Ga. 200, 205 (2003), where the question of pre arrest, pre indictment delay was in play. Applying the same "two prong test" (actual prejudice – deliberate delay) employed by the trial court in this case, the Court recited

> A due process violation requires a finding . . . that the delay caused actual prejudice to the defense . . . However, "any prejudice which results merely from the passage of time cannot create the requisite prejudice."

277 Ga., at 205 (citing and quoting *Wooten v. State,* 262 Ga. 876, 880 (1993)). Absent example or precedent, it is difficult to comprehend a prejudice caused by delay but not resulting from the mere passage of time.

The examples that do exist are instructive only regarding matters that do not constitute "actual prejudice." Most often, the message is the following purported quotation from *United States v. Marion*:

> The possibilities that "memories will dim, witnesses become inaccessible, and evidence be lost" are inherent in any extended delay, and, "these possibilities are ***not in themselves*** enough to

> demonstrate that [the appellant] cannot receive a fair trial . . . "

404 U.S. 307, 326 (1971) (emphasis supplied) See, e.g. *Wooten v. State*, 262 Ga. 876, 880 (1993); *State v. Madden,* 242 Ga. 637, 638 (1978); *Coker v. State, 185* Ga.App. 103, 104 (1987); *Ridgeway v. State,* 174 Ga.App. 663, 667 (1985); *Croom v. State,* 165 Ga.App. 676 (1983); *Hardwick v. State,* 158 Ga.App. 154, 155 (1981).

That language so often quoted is actually a misquote and, at that, is taken out of context. The headnote[55] from *United States v Marion*, is an accurate capsulation of the case and reads as follows:

> Prosecution of two defendants for alleged fraudulent business practices. The United States District Court for the District of Columbia, on defendants' motion, dismissed indictment for lack of speedy prosecution and the United States brought direct appeal. The Supreme Court, Mr. Justice White, held that the Sixth Amendment's guarantee of speedy trial is applicable only after person has been 'accused' of crime and . . . defendants' due process claims were speculative and premature because they had not claimed or proved actual prejudice resulting from the delay.

404 U.S. 307.

The paragraph from which the oft quoted language is taken is the final lines from the majority opinion authored by Justice White. The full paragraph is as follows:

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[55] Not usually an appropriate reference, the headnote is used here for brevity.

> The 38-month delay between the end of the scheme charged in the indictment and the date the defendants were indicted did not extend beyond the period of the applicable statute of limitations[56] here. Appellees have not, of course, been able to claim undue delay pending trial, since the indictment was brought on April 21, 1970, and dismissed on June 8, 1970. Nor have appellees adequately demonstrated that the pre-indictment delay by the Government violated the Due Process Clause. **No actual prejudice to the conduct of the defense is alleged or proved, and there is no showing that the Government intentionally delayed to gain some tactical advantage over appellees or to harass them.** ***Appellees rely solely on the real possibility of prejudice inherent in any extended delay: that memories will dim, witnesses become inaccessible, and evidence be lost. In light of the applicable statute of limitations, however, these possibilities are not in themselves enough to demonstrate that appellees cannot receive a fair trial and to therefore justify the dismissal of the indictment. Events of the trial may demonstrate actual prejudice, but at the present time appellees' due process claims are speculative and premature.***

United States v. Marion, 404 U.S. 307, 325-326 (1977) (emphasis supplied).

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[56] It would seem that the mandate of a Statute of Limitations should create an arena far different from the potentially endless looming of a murder charge, Certainly, the objectivity of a specific cut off date eases the readiness burden of prosecution and defense.

Neither *Marion* nor its frequent companion, *United States v. Lovasco,* 431 U.S. 783 (1977), creates the "two prong test" attributed to them in *Jackson v. State,* 279 Ga. 449, 451 (2005), and the half dozen or so other decisions from the Georgia Courts that preceded *Jackson.*[57] The language from *Marion* quoted in *Jackson* is

> "No actual prejudice to the conduct of the defense is alleged or proved, and there is no showing that the Government intentionally delayed to gain some tactical advantage over appellees or to harass them."

404 U.S., at 325. The quote is a portion of Justice White's final paragraph as reproduced above. The reference in those lines to the absence of a showing of intentional delay for tactical advantage by the prosecution does not purport to be for the establishment of a second part of the test of prejudice. Rather, the language is a reference to a "concession" in the government's briefing to the Supreme Court, in which it was acknowledged that if the government did intentionally delay for tactical advantage rather than investigative need, there would be a due process violation.[58] The language from the *Marion* decision is as follows:

> Nevertheless, since a criminal trial is the likely consequence of our judgment and since appellees may claim actual prejudice to their defense, it is

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[57] See e.g. *Wooten v. State,* 262 Ga. 876, 878 (1993); *Roebuck v. State,* 277 Ga. 200, 205 (2003); *Henderson v. State,* 272 Ga. 621, 623 (2000); *Mayfield v. State,* 264 Ga.App. 551, 558 (2003).

[58] Presumably the required level of prejudice needed to establish a due process violation where there has been such prosecutorial misconduct would be less than where the delay was needed for additional investigative efforts. See *United States v. Marion,* 404 U.S., at 324.

> appropriate to note here that the statute of limitations does not fully define the appellees' rights with respect to the events occurring prior to indictment. Thus, the Government concedes that the Due Process Clause of the Fifth Amendment would require dismissal of the indictment if it were shown at trial that the pre-indictment delay in this case caused substantial prejudice to appellees' rights to a fair trial and that the delay was an intentional device to gain tactical advantage over the accused.

404 U.S., at 324. It is unclear how the Court's acknowledgment of the prosecutorial concession became a "second prong" in Georgia's decisional authority, but with the decision in *Jackson v. State,* supra, and its cited predecessors it clearly has ascended to that status.

When the "delayed prosecution – due process" issue was revisited in *United States v. Lovasco,* the Court held that a lag in prosecution resulting from prolonged investigative efforts related to the case is not footing for a claim, of deprivation of due process, even if the defense might have been somewhat prejudiced by the lapse of time. 431 U.S., at 796. In that process, the Court in a footnote recalled the Government's concession in *Marion.*

> In *Marion* we noted with approval that the Government conceded that a "tactical" delay would violate the Due Process Clause. The Government renews that concession here, Brief for United States 32, and expands it somewhat by stating: "**A due process violation might also be made out upon a showing of prosecutorial delay incurred in reckless disregard of circumstances, known to the prosecution, suggesting that there existed an appreciable risk**

> **that delay would impair the ability to mount an effective defense,"** *Id.,* at 32-33, n. 25. As the Government notes, however, there is no evidence of recklessness here.

Id. (emphasis supplied).

While the Court may well have signaled that prosecution following a delay caused by such misconduct could be ground for a finding of due process denied, neither *Marion* nor *Lavasco* [sic] elevated that consideration to a required predicate to finding that Constitutional injury. If those cases had held otherwise, then the judicial approval of the governmental "concessions" became limitations on a defendant's right to fair trial.

But strangely, in the progression of these cases, governmental concessions parenthetically noted by the Court have been read as judicial directives. Confusion has been abundant in that process. Consider, for example the High Court's decision in *United States v. Eight Thousand Eight Hundred and Fifty Dollars ($8,850) in U.S. Currency,* 461 U.S. 555, 563 (1983), (hereinafter referred to as the *"Currency Case"*) a forfeiture case noted by this Court in *Jackson v. State*, supra. In successive paragraphs, the Court commented on the holding in *Lovasco* as follows:

> [T]he Government urges that the standard for assessing the timeliness of the [forfeiture action] be the same as that employed for due process challenges to delay in instituting criminal prosecutions. As articulated in *United States v. Lovasco,* 431 U.S. 783, 97 S.Ct. 2044, 52 L.Ed.2d 752 (1977), such claims can prevail only upon a showing that the Government delayed seeking an indictment in a deliberate attempt to gain an unfair tactical advantage over the defendant ***or***

> ***in reckless disregard***[59] ***of its probable prejudicial impact upon the defendant's ability to defend against the charges . . .***
>
> *Lovasco* recognized that the interests of the suspect and society are better served if, absent bad faith ***or extreme prejudice***[60] to the defendant, the prosecutor is allowed sufficient time to weigh and sift evidence to ensure an indictment is well-founded . . .

461 U.S. at 563-564 (emphasis supplied).

The Court in *Lovasco* was unabashedly less specific in its directive than those who have read the decision as establishing "prongs" to a test. Recognizing that when considering due process claims, absolute directives are less than helpful, the Court instructed:

> In *Marion* we conceded that we could not determine in the abstract the circumstances in which pre-accusation delay would require dismissing prosecutions, (Cit) More than five years later, that statement remains true. Indeed, in the intervening years so few defendants have established that they were prejudiced by delay that

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[59] As recognized by this Court in *Jackson v. State,* Justice O'Connor's majority opinion in the *Currency Case* does recognize at least a "reckless disregard" standard in assessing the role and impact on notions of fair trial resulting from governmental action or inaction in bringing about a delay in prosecution. 279 Ga., at 451.

[60] It is unclear whether the disjunctive "bad faith **or** extreme prejudice" should be read to mean that there must be both "bad faith **and** extreme prejudice" to establish a denial of a fair trial. Arguably, the wording could be read to contemplate prosecutorial misconduct "so bad" that standing alone it is a denial of due process, akin to the "presumptive prejudice" contemplated in Sixth Amendment speedy trial analysis. See e.g. *Doggett v. United States*, 505 U.S. 647, 652 (1992).

> ***neither this Court nor any lower court has had a sustained opportunity to consider the constitutional significance of various reasons for delay***. We therefore leave to the lower courts, in the first instance, the task of applying the settled principles of due process that we have discussed to the particular circumstances of individual cases. We simply hold that in this case the lower courts erred in dismissing the indictment.

431 U.S., at 796-797 (emphasis supplied).

In 1982, Chief Justice Rehnquist, writing for the majority in *United States v. Ricardo Valenzuela-Bernal,* quoted the language from *Lavasco* [sic] that is the most succinct statement of the holding in *Marion*:

> "Thus *Marion* makes clear that proof of prejudice is generally a necessary but not sufficient element of a due process claim, and that the due process inquiry must consider the reasons for the delay as well as the prejudice to the accused."

458 U.S. 858, 869 (1982) (quoting *Lavasco* [sic], 431 U.S. 783, 790 (1977)). The Chief Justice continued, giving insight into the process of determining when a due process violation requires remedy:

> Having borrowed much of our reasoning with respect to the Compulsory Process Clause of the Sixth Amendment from cases involving the Due Process Clause of the Fifth Amendment, we have little difficulty holding that at least the same materiality requirement obtains with respect to a due process claim. Due process guarantees that a criminal defendant will be treated with "that fundamental fairness essential to the very concept of justice. In order to declare a denial of it we must find that the absence of that fairness

> fatally infected the trial; the acts complained of must be of such quality as necessarily prevents a fair trial."

458 U.S., at 872.

Explaining that the "same 'prejudice' requirement [applicable to Fifth Amendment due process cases] has been applied to cases of post-indictment delay [where Sixth Amendment speedy trial issues are presented,]" Justice Rehnquist observed for the majority:

> In *Barker v. Wingo,* 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972) the Court set forth several factors to be considered in determining whether an accused has been denied his Sixth Amendment right to a speedy trial by the Government's pretrial delay. One of the four factors identified by the Court, and a factor more fully discussed in *United States v. McDonald,* 435 U.S. 850, 858-859, 98 S.Ct. 1574, 1551-52, 56 L.Ed.2d 18 (1978), was whether there had been any "prejudice to the defendant from the delay." *Id.,* at 858, 98 S.Ct., at 1551. Although the Court recognized that prejudice may take the form of "'oppressive pretrial incarceration'" or "'anxiety and concern of the accused,'" **the "'most serious'" consideration, analogous to considerations in this case, was impairment of the ability to mount a defense.** See *ibid.* (quoting *Barker v. Wingo,* supra, at 532, 92 S.Ct., at 2193). Thus, other interests protected by the Sixth Amendment look to the degree of prejudice incurred by a defendant as a result of governmental action or inaction.

458 U.S., at 869.

With that analysis, the Court explained that the determination that there has been a remediable due process injury resulting from "pre arrest – pre indictment" delay in prosecution begins with consideration of "the reasons for the delay as well as the prejudice to the accused." *Id.* While the elements of that inquiry have a faint resemblance to the "actual prejudice – intentional delay" analysis that has developed without input from or imprimatur of the United States Supreme Court, the factors are more subjective and allow for consideration of the issue on a case by case basis.

That is not to say that long term delay necessarily equates to violence to a defendant's right to due process. With pronouncement that "due process guarantees that a criminal defendant will be treated with that fundamental fairness essential to the very concept of justice," Chief Justice Rehnquist and the majority of the Court supplied the missing explanation that "[i]n order to declare a denial of [due process] [the court] must find that the absence of that [fundamental] fairness fatally infected the trial; the acts complained of must be of such quality as necessarily prevents a fair trial." *Id.* at 872.

Finally, with the reference noted above to *Barker v. Wingo* and the acknowledgment that there is a level of consideration common to Sixth Amendment speedy trial issues and Fifth Amendment due process delay issues, the Court made clear that when there is an extended pre-arrest and pre-indictment delay in charging a defendant, the true deliberations in determining whether there has been a deprivation of the right to a fair trial are as follows: (1) A consideration of the degree, if any, that the defendant's ability to mount a defense was impaired, and (2) If there was a significant impairment to that ability, a

consideration of the degree, if any, to which that impairment was a result of governmental action or inaction. 458 U.S., at 869.

1. TO WHAT DEGREE, IF ANY, WAS APPELLANT'S ABILITY TO MOUNT A DEFENSE IMPAIRED BY THE TWENTY YEAR DELAY IN BRINGING THE PROSECUTION?

> [T]he inability of a defendant adequately to prepare his case skews the fairness of the entire system. If witnesses die or disappear during a delay, the prejudice is obvious. There is also prejudice if defense witnesses are unable to recall accurately events of the distant past. Loss of memory, however, is not always reflected in the record because what has been forgotten can rarely be shown.

Barker v. Wingo, supra, 407 U.S., at 532.

To be sure, Appellant's ability to mount a defense was affected by each of these recited factors. The deaths of the investigating detective (T-247, 725), the Defendant's brother (T-411-412), the Emergency Medical Technician who authored the Ambulance Trip Report (T-551, 725-726), and the missing senior officer who wrote the police report regarding observations at the scene (T-558, 726), each created a void in the evidence. The loss of the shotgun (T-699, 715, 732) and the wadding taken from Ms. Debra Holton's wounds (T-732) left only speculation as to the applicable ballistics issues.

But the injury to Appellant's ability to mount a defense was much more than the faded memories, inaccessible witnesses and lost evidence "inherent in any extended trial delay." *Jackson v. State*, 279 Ga. 449, 451 (2005). The

harm to Appellant's right to be fairly tried came only in part from the void of lost testimony and missing evidence. The greater harm came from the manner in which the prosecution chose to fill that void, the substance used to fill it, and the secret treachery behind Appellee's trial preparation and presentation.

In the absence of the investigating detective and Appellant's brother who had been in the house with Appellant at the time of the shooting, Appellee's witnesses were unconstrained in describing what they told the investigator and what they claimed to have seen at 1252 Nixon Drive that morning.

As seen in Section A of this Argument, the first level at which Appellee exploited the evidentiary void was to open the case with a statement to the jury that included representations of anticipated evidence the state knew or had to know were false, but which the defense could not directly refute because the contradictory evidence was no longer available. For example, knowing that Mark Llera was dead and unable to respond outrageously false accusations of evidence tampering, the prosecutor promised evidence that after the shooting and before the police arrived, Mark Llera removed a screen door that held some kind of unspecified evidence incriminating of his sister, Appellant.

Additionally, in the absence of Mark Llera, Appellee was at liberty to promise, without fear of direct contradiction, evidence that Mark Llera, in order to create the impression that Debra Holton had attacked his sister, Appellant, planted "a handful" of hair from his sister's head on or near the body of Debra Holton before the police arrived. (T-162)

Appellee knew that no suggestion of any such evidence tampering had been made by any witness interviewed in 1982. Without any basis to believe it to be true, the prosecutor advised the jury that two witnesses who he knew had been interviewed in 1982, but who had not intimated any evidence tampering at that time, namely Hilda Lowery and Jackie Lowery, would come forward and testify to those facts at trial. Neither witness offered that testimony at trial; the prosecutor never had reason to believe they would. But absent ability of the defense to offer Mark Llera as a witness to directly deny the allegation, the prosecutor knew he could promise the testimony and gloss over his failure to produce it by leaving the jury uncertain of the reason Appellant did not refute it.

Given the intervening death of Hon. Hobart Hind, the former District Attorney for the Dougherty Judicial Circuit, the prosecutor could conveniently explain away the failure to bring an indictment for twenty years by making disgraceful and false accusations concerning the character and value judgments of the deceased public servant[61] who

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[61] In his opening statement, the prosecutor, without expecting to offer any evidence regarding the "reputation" of the former District Attorney who had been dead ten years or more when this case was tried, told the jury:

> We expect the evidence to show you that the DA's office took a dim view of [Debra Holton] as a person and a victim. She did have alcohol in her system, but that was all. Even though she was pregnant and she shouldn't have alcohol in her system, but she did. But the evidence will be that they took a dim view of [her] and that they were given false information about what happened the night before. Basically ***the Distr ct Attorney, Hobart Hind himself, who had a reputation for doing this stuff***, said we are not going to waste any more resources on [Debra Holton]. She is not worth wasting any more resources.

(T-165-166) (emphasis supplied).

investigated the case, accommodated the family of Debra Holton, presented the case to a grand jury when the critical witnesses and physical evidence was still available.

The lead detective, Captain Tommy Graham, who interviewed witness Zachary Haggard in 1982 and who prepared and preserved a written summary of that interview, died in the intervening years. Because Captain Graham could not refute it, witness Zachary Haggard, a convicted felon and friend of the family of Debra Holton and a member of the "conspiracy of silence," was able to denounce critical portions of the interview summary and claim that he had personally written and given to Captain Graham, a detailed narrative telling a version of events inconsistent with the officer's interview summary and much more sympathetic to Debra Holton.

The examples recited above are among the more egregious instances of unfairness in the trial of this case. They, along with other examples throughout this brief to events and evidence lost or changed, are only indirectly the result of the passage of time. They are not the simple and inevitable lapses in recall or misplaced people or things that visit all events over time. Here the passage of time did not merely fade evidence; it created opportunity – opportunity to "change the facts" by "creating memories" to replace the evidence that must have been crisp and clear when presented to the 1982 grand jury that found no cause to charge Appellant with anything.

If this is not a case where "delay caused actual prejudice to the defense" then there will be no cases that can satisfy the "first prong" of the test contemplated in *Jackson v. State*, supra.

2. *TO WHAT DEGREE, IF ANY, WAS THE DELAY THAT IMPAIRED APPELLANT'S ABILITY TO MOUNT A DEFENSE IN THIS CASE A RESULT OF GOVERNMENTAL ACTION OR INACTION?*

In determining if there has been a violation of Appellant's right to a fair trial, it has become immaterial whether the second consideration is part of the rigid "two prong" *Jackson* test or a more subjective focus on the prejudice to the accused balanced against a broader range of potential culpable governmental action. As it was presented at trial, this case will satisfy either test.

Poignantly contrary to what might have been expected by the prosecutor, the "evidence" offered by Appellee to assault a deceased former District Attorney is exactly the evidence that satisfies the "second prong" of the *Jackson* test.

Beginning with his outrageous pronouncement in opening statement that the District Attorney of that day "had a reputation for doing this stuff," (T-165-166) the prosecutor, rightly or wrongly, sought to portray a man with reckless disregard for the value of people when measured against the resources of his office.

If it is to be believed, Appellee presented the following uncontradicted evidence in portrayal of the man who, if Appellee is correct, recklessly disregarded his obligation to prosecute Appellant.

Testimony of Martha Nobles, a sister of Debra Holton (T-236):

After being told the shooting was an accident, Ms. Nobles came into some kind of "independent information" and took steps to have the case looked into further, (T-246) Ms. Nobles called the District Attorney's Office and Captain Graham continuously – "any time [she] saw something that looked like it proved anything. (T-247) After "two or three years" years, Ms. Nobles quit trying to have something done through the District Attorney's Office.

Testimony of Betty Butler, a sister of Debra Holton (T-263):

Ms. Butler contacted law enforcement on many occasions to see how things were going in the investigation (T-305) "After the grand jury did a no bill," Ms Butler and Ms. Nobles "had an audience with the district attorney himself." (T-305) They met with Mr. Hind who told them "the investigation was basically closed. He said that [Debra Holton] was not a worthy enough citizen for the taxpayers to further investigate this." (T-305)

Ms. Butler had some information that she tried to relate to Mr. Hind "about why he should open the investigation. (T-308) Mr. Hind told her it wasn't important. (T-309)

This Court has not specifically so held, but in its most recent decision on the subject matter, it was noted that there is authority from the United States Supreme Court that where a pre-indictment delay in a prosecution does result in actual prejudice to a defendant's ability to mount a defense, "a denial of due process is established if it is shown that the government delayed seeking an indictment

. . . in reckless disregard of [the] probable prejudicial impact upon the defendant's ability to defend against the charges." *Jackson v. State,* 279 Ga., at 451 (citing *U.S. v. Eight Thousand Eight Hundred and Fifty Dollars ($8,850) in U.S. Currency,* 461 U.S. 555, 563, (1983)).

There may be many who knew and respected Mr. Hind, including many members of the criminal defense bar in Albany, Georgia, but the only evidence regarding him in the record of this case was presented by Appellee, and it establishes that he was the representative of the government charged with the responsibility of prosecuting Appellant if she was to be prosecuted. That evidence also establishes that after the case was no billed in 1982, members of the family of Debra Holton contacted him "continuously" for two or three years in an effort to reopen the investigation.

The state would have the people of Dougherty County who elected Mr. Hind to high office on more than one occasion believe that, consistent with "a reputation for this kind of stuff," refused to take appropriate action by re-opening the case, thereby causing a twenty year delay in prosecution (T-163), all in reckless disregard of the wishes of his constituents and the probable prejudicial impact upon Appellant's ability to defend against the charges.

Solely because Appellee made those representations in opening statement and actually presented supporting testimony from the family of Debra Holton, and solely for purposes of this case, Appellant accepts as true Appellee's representation concerning Mr. Hind's reckless disregard. Appellant also offers that same evidence as satisfaction of the "second prong" of the *Jackson* test and submits that Appellant's conviction and sentence should be reversed

because the evidence establishes that that she was denied a fundamentally fair trial and due process of law.

* * *

APPEAL DOCKET NUMBER: S06A0385

IN THE SUPREME COURT OF GEORGIA

TONIE LLERA HOLTON,

APPELLANT,

v.

STATE OF GEORGIA,

APPELLEE.

APPEAL FROM THE SUPERIOR
COURT OF DOUGHERTY COUNTY

APPELLANT'S SUPPLEMENTAL BRIEF

(Filed Feb. 3, 2006)

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* * *

PART SIX: REGARDING APPELLANT'S FOURTH ENUMERATED ERROR

(Denial of Due Process because of Delay between the Death of Debra Holton and the Indictment of Appellant)

In addition to the argument raised in Appellant's Original Brief, this Court is asked to consider its view of controlling precedent from the United States Supreme Court with an eye toward the procedural status from which those cases were presented. Those decisions are, of course, *United States v. Marion*, 404 U.S. 307 (1971) and *United States v. Lovasco*, 431 U.S. 783 (1977) which Appellant respectfully submits this Court and others have read too restrictively in concluding that in cases where there is inordinate delay between an alleged offense and the indictment of an accused, due process is not offended by "any prejudice which results merely from the passage of time" and, even if there could be the requisite prejudice resulting from pre-indictment delay, there is no due process relief available to the accused unless the prosecutor intentionally caused the delay solely for the purpose of gaining a tactical advantage over the accused. See e.g. *Jackson v. State*, 279 Ga. 449, 451 (2005); *Roebuck v. State*, 277 Ga. 200, 205 (2003).

Both cases, *Marion* and *Lovasco*, reached the Supreme Court for review of pretrial dismissals of indictments by district court rulings holding that delay in bringing the indictments had prejudiced the respective defendants' rights to fair trial. *United States v. Marion*, 404 U.S. at 309-310; *United States v. Lovasco*, 431 U.S. at 785.

In *Marion*, the indictments had been returned by the grand jury thirty eight months after the conclusion of the alleged criminal enterprise and within the applicable four

year statute of limitations. 404 U.S. at 308-309. The defendants claimed:

> [T]he indictment was returned 'an unreasonably oppressive and unjustifiable time after the alleged offenses.' They argued that the indictment required memory of many specific acts and conversations occurring several years before, and they contended that the delay was due to the negligence or indifference of the United States Attorney in investigating the case and presenting it to a grand jury. **No specific prejudice was claimed or demonstrated.** The District Court judge dismissed the indictment for 'lack of speedy prosecution' at the conclusion of the hearing and remarked that since the Government must have become aware of the relevant facts in 1967, the defense of the case 'is bound to have been seriously prejudiced by the delay of at least some three years in bringing the prosecution that should have been brought in 1967, or at the very latest early 1968.'

404 U.S. at 309 (emphasis supplied).

The bulk of the majority opinion in *Marion* was devoted to a discussion of the speedy trial provision of the Sixth Amendment and a holding that the protection afforded by that provision did not apply to the circumstances before the Court. 404 U.S. at 314-321. The Court explained:

> Invocation of the speedy trial provision thus need not await indictment, information, or other formal charge. But we decline to extend that reach of the amendment to the period prior to arrest. Until this event occurs, a citizen suffers no restraints on his liberty and is not the subject of

> public accusation: his situation does not compare with that of a defendant who has been arrested and held to answer. Passage of time, whether before or after arrest, may impair memories, cause evidence to be lost, deprive the defendant of witnesses, and otherwise interfere with his ability to defend himself. But **this possibility of prejudice** at trial is not itself sufficient reason to wrench the Sixth Amendment from its proper context. **Possible prejudice** is inherent in any delay, however short; it may also weaken the Government's case.

404 U.S. at 321 (emphasis supplied).

The Court then turned to the role of Statutes of Limitation in Pre-indictment cases, explaining

> Statutes of Limitation are the primary guarantee against bringing overly stale criminal charges. Such statutes represent legislative assessments of relative interests of the State and the defendant in administering and receiving justice; they 'are made for the repose of society and the protection of those who may (during the limitation) . . . have lost their means of defense. These statutes provide predictability by specifying a limit beyond which there is an irrebuttable presumption that a defendant's right to a fair trial would be prejudiced.

404 U.S. at 321 (citations omitted).

The Court observed that in most instances the Statutes "protect individuals from having to defend against charges when the basic facts may have become obscured by the passage of time and to minimize the danger of official punishment because of acts in the far-distant past." 404 U.S. at 323. The Court concluded there is "no need to

press the Sixth Amendment into service to guard against **the mere possibility that pre-accusation delays will prejudice** the defense in a criminal case since statutes of limitation already perform that function." *Id.* (emphasis supplied).

The part of the Marion case that appears to be routinely overlooked is that the Court allowed for the possibility that, even though under the circumstances presented by the defendants in that case were *not entitled pre-trial relief* under the speedy trial directive of the Sixth Amendment or the applicable statute of limitations,[16] their circumstances might be such that Fifth Amendment "due process" might afford them **post trial relief in the event the delay in prosecution resulted in actual prejudice.**

> No actual prejudice to the conduct of the defense is alleged or proved, and there is no showing that the Government intentionally delayed to gain some tactical advantage over appellees or to harass them. Appellees rely solely on **the real possibility of prejudice inherent in any extended delay:** that memories will dim, witnesses become inaccessible, and evidence be lost. In light of the applicable statute of limitations, **however, these possibilities are not in themselves enough to demonstrate that appellees cannot receive a fair trial and to therefore justify the dismissal of the indictment. Events of the trial may demonstrate actual prejudice, but at the present time**

[16] Of course, depending on the actions of the government in pursuing the charges against those defendants, they might be entitled to Sixth Amendment or Statute of Limitation relief in the future.

> **appellees' due process claims are speculative and premature.**

404 U.S. at 325-326 (emphasis supplied).

Thus, the language of the *Marion* decision is an instruction that Fifth Amendment due process *will not provide pre-trial relief* based on the "**possibility of prejudice inherent in any extended delay:** that memories will dim, witnesses become inaccessible, and evidence be lost." *Id.* (emphasis supplied). It is not authority for the proposition that after a conviction the Courts will not consider that a defendant's right to a fair trial suffered **actual prejudice** solely as the result of delay. There is no time exception written into the due process guarantees of the Fifth and Fourteenth Amendments to the United States Constitution or into the Constitution of this Great State. See GA. CONST. ART. I, §1, ¶ 1. Those protections do not have a provision that citizens enjoy the right to a fair trial "as soon as the government gets to it."

When the Court decided *United States v. Lovasco*, supra, it explained and confirmed the decision in *Marion*, specifically observing that the earlier decision included an acknowledgement "that the 'statute of limitations does not fully define (defendants') rights with respect to the events occurring prior to indictment,' and that the Due Process Clause has a limited role to play in protecting against oppressive delay." 431 U.S. at 787-789 (quoting from *United States v. Marion*, 404 U.S. at 324). Rather than expand or contract the reasoning or the scope of the *Marion* decision, the Court simply applied it to the facts presented.

> We are to determine only whether the action complained of here, compelling respondent to

> stand trial after the Government delayed indictment to investigate further violates those "fundamental conceptions of justice which lie at the base of our civil and political institutions," and which define "the community's sense of fair play and decency,"

431 U.S. at 790.

The Court did, however, answer the question immediately posed in this case. The Supreme Court of the United States has not established or undertaken to establish specific criteria by which to determine future claims of due process violation resulting from pre-accusation delay. To the contrary, with the following language, the Court acknowledged that it could not do so:

> In *Marion* we conceded that we could not determine in the abstract the circumstances in which preaccusation delay would require dismissing prosecutions. More than five years later, that statement remains true. Indeed, in the intervening years so few defendants have established that they were prejudiced by delay that neither this Court nor any lower court has had a sustained opportunity to consider the constitutional significance of various reasons for delay. We therefore leave to the lower courts, in the first instance, the task of applying the settled principles of due process that we have discussed to the particular circumstances of individual cases. We simply hold that in this case the lower courts erred in dismissing the indictment.

United States v. Lovasco, 431 U.S. at 706-707.

What is clear from *Marion* and *Lovasco* is that "possible prejudice" or "potential prejudice" to a defendant's due

process right resulting from delay in making accusations will not suffice to dismiss an indictment. Only "actual prejudice" to that right will merit the scrutiny that may bring the relief sought by Appellant in this case.

The Court has also held that the cause of the delay and resulting actual prejudice must be considered. As noted in Appellant's original Brief, in spite of its concession that abstract predetermined circumstances could not be set to establish when a pre-accusation delay will merit relief, the Supreme Court did note with approval a government concession on that issue:

> A due process violation might . . . be made out upon a showing of **prosecutorial delay incurred in reckless disregard of circumstances of circumstances** [sic], **known to the prosecution, suggesting that there existed an appreciable risk that delay would impair the ability to mount an effective defense.**

United States v. Lovasco, 431 U.S. at 796 (fn17).

Noting that "[t]here is no objective evidence as to why former [District Attorney Hobart] Hind chose not to continue investigating this case," (A.G. Brief at 36), the Attorney General argues "[t]he fact that [Mr.] Hind decided not to pursue any further investigation should not be held against the current district attorney . . . " (AG Brief at 37) Respectfully, the Attorney General misses the point. Due process is not a commodity to be disbursed or withheld by public officers accountable only while they are in office. If, as alleged in Appellee's opening statement, the district attorney from two decades before, after the grand jury return of a "no bill" in this case, recklessly disregarded the rights of all concerned and thereby caused a

delay in the return of an indictment during which an entire generation of presumably objective witnesses with fresh memories died or disappeared or forgot what they had written or told about the incident, the ability of Appellant to mount a defense was seriously impaired. When that lost generation of witnesses was replaced with a new generation of secret witnesses delivered by the friends and family of the deceased, the ability of Appellant to mount a defense was destroyed.

If *Marion* and *Lovasco* have any meaning, then the conviction of Appellant must be reversed and any further prosecution of this case must be terminated.

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